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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 349

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

FRANKLIN JONES, ADMINISTRATOR OF THE ESTATE OF D. R. FERGUSON, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED JUNE 3, 1937

CERTIORARI GRANTED OCTOBER 18, 1937

(32,801)

( )

SUPREME COURT OF THE UNITED STATES

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FRANKLIN JONES, ADMINISTRATOR OF THE ESTATE OF D. R. FERGUSON, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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[fols. a-1] [Caption omitted]

IN DISTRICT COURT OF BOWIE COUNTY, TEXAS

LEONARD JONES, Admnr.,

vs.

KANSAS CITY SOUTHERN RAILWAY CO.

AMENDED PETITION—Filed November 17, 1924

To the Honorable Hugh Carney, judge of said court:

Comes now the Plaintiff, leave of Court being had, and files this his Amended Original Petition, amending his petition heretofore filed so that the same shall hereafter read as follows:

Your Petitioner, Leonard Jones, Administrator of the Estate of D. R. Ferguson, deceased, and personal representative of the said D. R. Ferguson, deceased, who will be styled Plaintiff herein, complaining of the Kansas City Southern Railway Company, a body politic, which will be styled Defendant herein, represents and shows that the Plaintiff resides in Harrison County, Texas, and is the duly appointed and qualified Administrator of the estate of D. R. Ferguson, deceased, acting under an appointment made in the County or Probate Court of Bowie County, Texas; that the said Kansas City Southern Railway Company is a body politic duly incorporated and is engaged [fol. 2] in the business of a common carrier by railroad over certain lines of railroad running through the states of Missouri, Arkansas, Texas, and Louisiana, and has local agents and representatives in Bowie County, Texas, and is engaged in business in Bowie County, Texas.

1

The Plaintiff shows that on February 12, 1922 while D. R. Ferguson was employed by and working for defendant as a car inspector in its yards at Leesville, La., he was killed by defendant's wrongful conduct and negligence under such circumstances as to create a cause of action against the defendant as follows:

1—Rec.

The plaintiff shows that the injaries inflicted upon and death of D. R. Ferguson were caused by reason of the defendant violating and failing to comply with the laws of the United States commonly known as the Natioanl or Federal Safety Appliance Laws and the aplicable rules of the Interstate Commerce Commission promulgated thereunder in this: That prior to the time the said D. R. Ferguson was killed, that the National Congress had enacted certain laws applicable to causes of action of this kind commonly known as Safety Appliance Laws and Employers Liability laws applicable to railroads engaged as common carriers in commerce between the several states and to the employes of such railroads by and under which the Interstate Commerce Commission was empowered and authorized to enact rules and regulations with reference to certain equipment used and operated on lines of railroad which are engaged in interstate commerce, and that the defendant railway company was so engaged in interstate commerce as a common carrier by railroad at the time the said D. R. Ferguson was [fol. 3] killed and his death was caused by the said railroad violating the safety appliance laws and applicable rules and regulations of the Interstate Commerce Commission theretofore promulgated and in force in this. That the Interstate Commerce Commission had under the authority granted in the said Safety Appliance Laws promulgated and required to be enforced a rule or regulation—to the effect that locomotives used in road service at night shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen to see in a clear atmosphere a dark object as large as a man of average size standing erect at a distance of 800 feet ahead and in front of such headlight, and that such headlight so used on road engines shall be provided with a device whereby the light from same may be diminished in yards and at stations or when meeting trains.

The plaintiff shows that the said locomotive that caused the injuries to and death of the said D. R. Ferguson was a road engine or locomotive and was in use on an interstate railroad and was equipped with a headlight of the illuminating powers required by the said rules and regulations but

that the same was not equipped with a device whereby the light from same could be diminished in passing through the yards, and that by reason of the failure to so equip the said locomotive with such device, that the light therefrom was so great that it blinded and confused the said D. R. Ferguson and caused him to come in contact with or be [fol. 4] struck by the said locomotive, or that the same caused him to be deceived and misled as to the rate of speed at which the train was traveling and as to the distance the same was from him, thereby causing him to be struck and injured thereby. That by reason of the said light being so strong, bright, and glaring that the said D. R. Ferguson was deceived as to the distance of the said train and the speed thereof and could not tell with reasonable accuracy how near the same was to him and was thereby misled into thinking and assuming that the engine was a sufficient distance away from him as to not bring him in danger of being injured thereby; or that the said headlight was so bright, strong and glaring as to so confuse and deceive the said D. R. Ferguson as to cause him to be unable to know and appreciate the fact that he was on the main line track or so near thereto as to be struck by the approaching train, and that the train was thus brought upon and against him, inflicting upon him the injuries that resulted in his death; that his death being thus caused in whole or in part by a violation of the Safety Appliance Laws, the plaintiff is entitled to recover from the defendant for the use and benefit of the children of the said D. R. Ferguson such damages as they have sustained by reason of his death.

2

The plaintiff shows that if the said locomotive was in fact equipped with a device for diminishing the light thereof in the said yard, that those in charge of the operation of the said road engine *engine* did not diminish the light as it passed into and through the said yards, but that they negligently let and permitted the same to burn or shine with [fol. 5] full illuminating power making a light so bright, strong and glaring as that the said D. R. Ferguson was deceived by reason thereof as to the approach and speed of the said train and could not tell with reasonable accuracy how near the same was to him and was thereby misled

into thinking and assuming that the engine was a sufficient distance away from him and traveling at such a reasonable rate of speed as to not bring him in danger of being injured thereby, and that the same was thus brought upon and against the said D. R. Ferguson by reason of the person in charge of the operation of the said locomotive failing to diminish the light thereby inflicting upon him the injuries that resulted in his death; or that the said light was so bright and glaring as that the same blinded, deceived and confused the said D. R. Ferguson in such way and to such extent as to deceive him as to his location and to render him unable to appreciate and understand that he was on or near the main line and in the path of danger from the said train, thereby negligently causing him to be struck and injured by the said train.

3

The plaintiff without waiving his rights under the said Safety Appliance Law and the applicable rules of the Interstate Commerce Commission thereunder, but relying upon them alleges and shows that if he is mistaken, however, as to their application to the facts in this case, that he is nevertheless entitled to recover from the defendant the damages sustained by the said children of the said D. R. Ferguson in that the plaintiff shows that heretofore, to-wit, on the 12th day of February, 1922, and long prior thereto, D. R. Ferguson was in the employ of the Kansas City Southern [fol. 6] Railway Company at Leesville, Louisiana, and that while actively in the discharge of his duties at said place, that he received and there were inflicted upon him certain severe personal injuries by reason of the negligence of the said defendant, its agents, servants and employes, which then and there resulted in and caused the death of the said D. R. Ferguson.

4

Your petitioner shows that the said injuries to and death of the said D. R. Ferguson were inflicted upon him and caused his death by reason of the negligence of the said defendant, its agents, servants and employes in one or more of the ways herein get out, namely:

First. That the said D. R. Ferguson was employed by the said defendant as a car inspector at Leesville, La., and that it was his duty to assist in making up and breaking up and inspecting cars and trains that came into and left the yards of the said defendant at Leesville, and that on, to-wit, the 12th day of February, 1922, while the said D. R. Ferguson was in the active discharge of his duty in assisting in making up a train at Leesville and making inspections thereof, which train was located on and being made up from the side track near the main line of the said defendant in the town of Leesville, that the said defendant caused or permitted a passenger train to run upon and pass over the said main line of the said defendant through the said town of Leesville and along where the said D. R. Ferguson was engaged in the work of making up and inspecting the said frieght train, and that the said passenger train contrary to custom and usage ran into the town of Leesville and approached the passenger station and passed the point where the said freight train was being made up [fol. 7] and inspected by the said D. R. Ferguson without the said passenger train and those in control thereof reducing its rate of speed and without the bell being rung or the whistle being blown to apprise persons of the approach thereof, and that the train was also run into the said station at a dangerously high and unlawful rate of speed contrary to the usages and practices.

5

The plaintiff shows that the said D. R. Ferguson, while in the discharge of his duties in the work in which he was engaged, stepped or moved from the cars of the freight train that he was inspecting or assisting in making up, and that in doing so he came within the path of the said rapidly approaching passenger train and was struck by it without any knowledge of its approach and without any warning of its approach, or if he knew or was advised in any way of the approach of the said passenger train, that he expected the same to be running at a reasonable rate of speed, and without knowing that the train was running at a dangerously high rate of speed, and that if he had known that the train was running at a high rate of speed, he could have gotten out of the way thereof, and if the said train

had been running at the usual rate of speed, he would have gotten out of the way of the said train or not come in contact with the same.

The plaintiff shows that by reason of the said train being run at a dangerously high rate of speed, and especially at a much higher rate of speed than it was customary for the same to be run, and that by reason of the train being run at an unlawful rate of speed, and by reason of the same being operated into the said station without the bell being rung and the whistle being blown, or other timely notice being given of the approach of the said train, that the said D. R. [fol. 8] Ferguson was caused, in the discharge of his duties either in walking around the said train that he was inspecting, or in stepping away from the said train, or in attemption- to go across the said main line, brought into a position where by reason of the said passenger train being negligently operated along and over the said track at the said place, that the same struck the said D. R. Ferguson and inflicted upon him injuries that resulted in his death.

6

The plaintiff shows that at the time the said train struck and killed the said D. R. Ferguson, that the said defendant was a common carrier by railroad engaging in commerce between the various states of the Union, to-wit, the state of Louisiana, Texas, Arkansas, Missouri, and various other states, and that the said deceased, D. R. Ferguson, was employed by the said defendant in such interstate commerce at the time he was killed, and that the plaintiff is entitled to recover damages against the said defendant for the death of the said D. R. Ferguson under what is commonly known as the National or Federal Employers' Liability Laws, giving to employes of railway companies and their personal representatives a cause of action where an injury or death is caused by reason of the defective condition of the track, roadbed, etc., due to the negligence of the defendant, and by reason of negligence of the *ga*ents, servants and employes of the said defendant.

7

The plaintiff shows that at the time the said D. R. Ferguson was killed, he was a strong, healthy man, earning and

able to earn the sum of, to-wit, $150.00 per month, which [fol. 9] he contributed to the support and pleasures of his said children. That he was a kind and affectionate father and contributed not only his earnings to his said children, but advised them and counseled them in the ways that they should grow, and was greatly interested in the moral training and upbuilding of the character of the said minor children, and that by reason of the death of the said D. R. Ferguson, the said children have suffered great pecuniary loss and damage in the sum of to-wit, Forty Thousand ($40,000.00) Dollars actual damages.

8

The plaintiff shows that the said D. R. Ferguson left the folowing children, to-wit, Miss Ona Ferguson, now Mrs. Ona Carlisle, K. D. Ferguson, Jewel Ferguson, now Mrs. Jewell Lewis, Rupert Ferguson, and Otis Ferguson; that the mother of the said children died prior to the time that D. R. Ferguson was killed, and that the said D. R. Ferguson contributed his earnings and labor to the maintenance, care, education, etc., of said children and would have continued to contribute the same to said children but for his untimely death.

9

The plaintiff alleges and shows that he is not able to name or describe with better particularity than in his petition set forth the person or persons acting for and representing the defendant guilty of the various acts of negligence, resulting in and causing the injuries to and death of D. R. Ferguson, but that the said injuries to and death of the said D. R. Ferguson were caused in whole or in part by the defendant violating the said Safety Appliance Laws as set forth herein, and were caused by the negligence of the agents, servants and employes of the said defendant in the respects set forth and referred to herein, and for [fol. 10] the said injuries so resulting in the death of the said D. R. Ferguson, the plaintiff is entitled to recover the damages sustained by the said surviving children of the said D. R. Ferguson.

Wherefore, the premises considered, defendant having been cited to answer, the plaintiff prays that upon final

hearing he have judgment against the said defendant for the use and benefit of the said children of the said D. R. Ferguson in the sum of Forty Thousand ($40,000.00) Dollars actual damages, all costs of suit, and for general relief.

Jones, Sexton & Jones, Attorneys for Plaintiff.

[File endorsement omitted.]

In District Court of Bowie County

[Title omitted]

Second Amended Answer—Filed November 17, 1924

The defendant in the above cause, by leave of the court, files this its amended original answer, in lieu of its answer previously filed herein, and for such amended answer says:

[fol. 11] 1

The defendant demurs generally to plaintiff's petition, because same alleges no facts authorizing a recovery against this defendant, and of this demurrer it prays judgment.

2

The defendant specially excepts to all of the allegations contained in the plaintiff's petition herein, wherein or whereby this defendant is charged with any negligent act or omission, or with negligence of any character, because this action is brought and is sought to be maintained alone under and by virtue of the provisions of an act of Congress *pu*pularly known as the Federal Employers' Liability Act; and under the provisions of that act "a common carrier by railroad" is not made liable for its negligence resulting in the injury or death of one of its employees, unless such injury or death results in whole or in part from a defect or insufficiency in its "cars, engines, machinery, track, roadbed, works, boats, wharves or other equip*emtn*," and because it is not alleged in the plaintiff's petition that the death of the deceased D. R. Ferguson, resulted in whole or in part by reason of any defect or insufficiency due to defendant's negligence in its "cars, engines, machinery, track, roadbed, works, boats, wharves or other equipment."

Of this special exception the defedant prays the judgment of the court, and that it be sustained.

3

The defendant specially excepts to the plaintiff's petition herein, and to all parts thereof wherein it is alleged that the defendant's agents, servants and employees were guilty of any negligent acts or omissions resulting in whole or in part in the death of the deceased, D. R. Ferguson, be- [fol. 12] cause such allegations are too vague, indefinite and uncertain to enable the defendant properly to make answer thereto, and especially because the names of the alleged servants, agents and employees are not alleged, and it is not alleged which of such agents, servants and employees alleged to have been guilty of the negligence charged was an officer, which an agent, and which merely an employee, or whether either was an officer, an agent or merely an employee; and it is not alleged in such petition in what line of duty, service or employment the several agents, servants and employees of defendant charged with negligence resulting in the death of the deceased were engaged with or for the defendant at the time the alleged negligence so charged occurred; and it is not alleged in said petition what negligence each of such agents and employees of defendant was guilty of resulting in whole or in part in the death of the deceased.

Of this exception the defendant prays the judgment of the court, and that it be sustained, and that plaintiff be required to make the allegations of his petition more definite and certain in the particulars pointed out by this exception.

4

Subject to the above and foregoing demurrer and special exceptions, the defendant for its answer, if required to answer, denies all and singular the allegations of the plaintiff's petition herein, and of this puts itself upon the country.

5

For its further and special answer and plea herein this defendant alleges that at the date of his death, and for a

[fol. 13] long time prior thereto, the deceased, D. R. Ferguson, was in its employ as a car-inspector in the yards of the defendant at Leesville, State of Louisiana; that its yard at said place, at the date of the death of said deceased, and for a long time theretofore, consisted of numerous tracks and switch tracks, including its main line tracks over and upon which it ran its trains and locomotives and switched cars and made up trains, and did all such things as are usually done in a modern railroad yard; that the said deceased at the date of his death was familiar, and for a long time theretofore had been familiar, with the said yard, the location of defendant's tracks therein, and with the fact, as fact it was, that defendant's locomotives and cars were constantly being moved about in said yard, and that the trains of defendant were run into and through said yard, and particularly knew, and for a long time had known, the time when the train, which it is alleged struck and killed him, ran into and through said yard, the track upon which it was run, and the manner and speed with which it was customarily run into and through such yard; that the duties of the said deceased under his employment required him to go into and be in the said yards, and to perform his duties in the said yards, and in the performance thereof to go between, over and across the tracks of defendant making up the said yards, and that by reason of entering into and remaining in the employment of the defendant, and undertaking the duties of his said employment, the said deceased assumed the risks and dangers of being struck and killed or injured by the operation of the trains, cars and locomotives of the defendant being operated in and through the said yard in the usual and cus-[fol. 14] tomary manner on and over all of its tracks in the said yard; and the defendant further says that if one of its trains, as alleged by the plaintiff, struck and killed the deceased, it did so while it was being run into and through its said yard in the usual and customary manner, and at a time when deceased knew it would be so run, and at the customary time, and on the track on which it was usually and customarily run, all of which facts, as aforesaid were well known to the deceased, and if the deceased was struck and killed by such train, or any train, of the defendant, that his death thereby caused was the result, and

the proximate result, of a risk and danger assumed by him in the course and performance of the duties of his employment, and for this reason the plaintiff herein cannot and should not recover.

5-a

The defendant, further answering herein, says that the headlight on the locomotive which was pulling its passenger train which came into Leesville, Louisiana, at or about the time and on the night D. R. Ferguson was killed, was properly equipped with a device or devices for decreasing, dimming or diminishing the light produced by such headlight, as required by any order or regulation of the Interstate Commerce Commission.

Defendant further says that D. R. Ferguson, at the time he was killed, and for a long time theretofore, well knew that it was not the custom of the defendant's servants operating its locomotives on its main line into Leesville, Louisiana, and especially the locomotive pulling the train alleged to have struck and killed him, in approaching its depot at said place, not to dim or diminish the light pro-[fol. 15] duced by the head light and head lights used on such locomotive and locomotives; and if there was any danger to said Ferguson arising or produced from so doing, the said Ferguson well knew such custom, and the danger, if any, arising therefrom, and by remaining and working in defendant's yard at Leesville with such knowledge, assumed any risks or dangers, if any there were, from running such locomotive as aforesaid without dimming or diminishing the light produced by the head lights thereon, and that the plaintiff cannot recover herein for such reason.

6

For its further and special answer herein, the defendant says that if the deceased, D. R. Ferguson, as alleged by the plaintiff, was struck and killed by one of its trains at Leesville, in the State of Louisiana, at the time alleged by the plaintiff, that his death was solely caused and brought about by, through and on account of his own negligence and carelessness, in that the said deceased was an experienced railroad man, was at work, or had been at work, in the de-

fendant's said yard at Leesville, Louisiana, at or a short time before his death occurred, and that he, without any care for his safety, and while intoxicated negligently and carelessly placed himself in such position upon or near the defendant's track in front of or too near one of its moving trains, and thereby, and without any regard for his own safety, negligently and carelessly caused himself to be struck and killed by one of the defendant's locomotives and cars, without any fault or negligence on the part of the defendant, its agents, servants or employees, and for this reason, and because the negligence of the deceased was the sole proximate cause of his death, the plaintiff herein can-
[fol. 16] not recover, and if entitled to recover at all, such recovery should be and must be diminished in proportion to the negligence of the deceased as above stated.

Wherefore, the defendant prays that the plaintiff take nothing by this suit, and that it go hence, discharged with its costs.

King, Mahaffey & Wheeler, Attorneys for Defendant.

[File endorsement omitted.]

In District Court of Bowie County

[Title omitted]

Charge to Jury—Filed November 19, 1924

Gentlemen of the Jury: This cause will be submitted to you on Special Issues of fact, as follows, to-wit:

No. 1. Do you believe from the evidence that the failure of defendant's servants or agents in charge of the operation of the passenger train which struck and killed D. R. Ferguson in the yards at Leesville, La., on or about Feb. 12th, 1922, to dim the headlight of the engine of said train, as the said train approached the place where the said D. R. Ferguson was struck, was negligence on the part of said servants or agents in charge of said train?

Answer "Yes" or "No."

[fol. 17] To aid you in answering the foregoing issue and other issues in this charge where the question of negligence is an issue, you are instructed that "negligence" is the failure to use ordinary care. "Ordinary care" is such care as a man of ordinary prudence would use under the same or similar circumstances.

No. 2. Do you believe from the evidence that the failure to dim the headlight of said engine at said time and place caused the said D. R. Ferguson to be blinded and thereby was a proximate cause of the death of the said D. R. Ferguson?

Answer "Yes" or "No".

To aid you in answering the foregoing issue and other issues in this charge where the question of proximate cause is an issue, you are instructed that by "proximate cause" is meant that cause which in a continuous sequence, unbroken by any new, independent cause, produces an event or injury and but for which the same would not have occurred.

No. 3. Do you believe from the evidence that the train, which struck the said D. R. Ferguson, at the time it aproached the place in the yard at Leesville where the said D. R. Ferguson was struck, was being operated at a dangerously and unusually high rate of speed?

Answer "yes" or "no".

No. 4. If you answer No. 3 "No" you need not answer this issue. If you answer No. 3 "Yes" then was such rate of speed of operation of said train, at said time, and place, negligence, as that term has hereinbefore been defined to you?

Answer "Yes" or "No".

No. 5. If you answer No. 3 or No. 4 "No" then you need not answer this issue. If you answer both No. 3 and No. 4 "Yes", then was such rate of speed of operation of said [fol. 18] train a proximate cause of the death of the said D. R. Ferguson, as that term "proximate cause" has hereinbefore been defined to you?

Answer "Yes" or "no."

No. 6. Do you believe from the evidence that the servants or agents of defendant in charge of the engine of said

train which struck the said D. R. Ferguson, on or about the aforesaid time and place, failed to ring the bell of said engine, as said train approached the place where the said D. R. Ferguson was struck?

Answer "Yes" or "No."

No. 7. If you answer No. 6 "No," then you need not answer this issue. If you answer No. 6 "Yes" then was the failure to ring the bell of said engine, at said time and place, negligence, as that term is hereinbefore defined to you?

Answer "Yes" or "No."

No. 8. If you answer No. 6 or No. 7 "No," then you need not answer this issue. If you answer No. 6 and No. 7 "Yes," then was such failure to ring the bell of said engine, at said time and place a proximate cause of the death of the said D. R. Ferguson, as that term—proximate cause—has hereinbefore been defined to you.

Answer "Yes" or "No."

No. 9. Do you believe from the evidence that the servants or agents of defendant in charge of the engine of said train which struck the said D. R. Ferguson, on or about the time and place aforesaid, failed to sound the whistle of said engine, as said train approached the yards wherein the said D. R. Ferguson was working?

Answer "Yes" or "No."

[fol. 19] No. 10. If you answer No. 9 "No," then you need not answer this issue. If you answer No. 9 "Yes," then was the failure to sound the whistle of said engine negligence, as that term is hereinbefore defined to you?

Answer "Yes" or "No."

No. 11. If you answer No. 9 or No. 10, "No," then you need not answer this issue. If you answer No. 9 and No. 10, "Yes," then was the failure to sound the whistle of said engine a proximate cause of the death of the said D. R. Ferguson, as that term—proximate cause—is hereinbefore defined to you?

Answer "Yes" or "No."

No. 12. Do you believe from the evidence that the deceased, D. R. Ferguson, by reason of his employment

as car inspector assumed the risk of injury such as caused his death?

Answer "Yes" or "No."

To aid you in determining the foregoing issue, you are instructed that a servant in entering the employment of the master, assumes the risks of injury, which are usually and ordinarily incident to the work of his employment. He does not, however, assume the risk of the negligence of the master, its servants or agents, unless he knows of the same and realizes the danger. So that if you believe that the said D. R. Ferguson was struck by said train and that the danger of so being struck was a risk ordinarily incident to his employment or a risk arising from negligence of the operatives of said engine of which he knew and realized the danger arising therefrom, then you will answer No. 12 "Yes," otherwise you will answer No. 12, "No."

[fol. 20] No. 13. What amount of money, if paid in cash now, will fairly and reasonably compensate the surviving children of the said D. R. Ferguson for their pecuniary damages, if any, resulting from his death?

Answer in Dollars and Cents.

To aid you in determining your answer to No. 13, you may take into consideration the pecuniary value of the advice and admonition, if any, the deceased would have given his minor children during their minority, had he lived; the value of the contributions, if any, in money and other things of pecuniary value, that you believe the deceased would have contributed to his children, during their minority, had he lived. You may not allow any amount as damages to those surviving children of the deceased who were already 21 years of age at the time of the death of the said D. R. Ferguson. By "minority" of the surviving children of deceased is meant the period of their respective lives up to 21 years, or, in the case of girls, up to the time of their marriage, if they marry before they reached the age of 21 years. You may not take into consideration in estimating the amount of damages, if any, any grief or sorrow suffered by the surviving children of deceased by reason of his injuries and death.

No. 14. Do you believe that the deceased, D. R. Ferguson, was intoxicated at the time he was struck and killed in the yards at Leesville, on or about Feb. 12th, 1922?

Answer "Yes" or "No."

No. 15. Do you believe that the deceased, D. R. Ferguson, was guilty of contributory negligence in carelessly or while [fol. 21] intoxicated placing himself in such position upon or near defendant's main line track that he was struck and killed by an incoming passenger train in the yards at Leesville on or about Feb. 12th, 1922?

Answer "Yes" or "No."

To aid you in answering the foregoing issue, you are instructed that "contributory negligence" is such negligence on the part of the deceased as caused or contributed to cause his own death or injury.

No. 16. If you answer No. 15 "No," you need not answer this issue. If you answer No. 15 "Yes," then how much do you believe from the evidence the damages, if any accruing to plaintiff by reason of said death of said D. R. Ferguson, should be diminished by reason of the contributory negligence of deceased?

Answer in Dollars and Cents.

To aid you in determining the answer to the foregoing issue you are instructed that if the defendant was guilty of negligence as aforesaid and the deceased also was guilty of contributory negligence then you will diminish the damages allowed his children by reason of his death, in proportion as his negligence, if any, bears to the negligence, if any, of the defendant.

The burden of proof is on the party asserting the affirmative of each of the foregoing issues to establish the same by a preponderance of the evidence. By "preponderance of the evidence" is meant the greater weight of credible testimony.

You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given the testimony, but you will receive the law from the court which is herein given you and be governed thereby.

[fol. 22] Hugh Carney, District Judge 5th Judicial District of Texas.

[File endorsement omitted.]

In District Court of Bowie County

[Title omitted]

Defendant's Requested Special Issues Given to Jury—Filed November 19, 1924

Gentlemen of the Jury:

No. 17. Answer the following:

If you should find from the evidence that the agents and servants of defendant in charge of its locomotive failed to sound the whistle thereon in approaching its station at Leesville, Louisiana, and also failed to ring the bell on such engine while it was being run through its yard at Leesville, then from the evidence, you will answer this question:

Could D. R. Ferguson, in the exercise of ordinary care for his own safety, and assuming that he knew the time for the arrival of such train, have discovered the approach of such train in time to have prevented being struck thereby?

Answer "Yes" or "No".

King, Mahaffey & Wheeler, Attorneys for the Defendant.

Special Issue No. 17, Requested by Defendant. Given. Hugh Carney, Judge.

[fol. 23] [File endorsement omitted.]

[Title omitted]

Gentlemen of the Jury: Answer the following: Could D. R. Ferguson, by the use of ordinary care on his part, have avoided being struck by the locomotive which is alleged to have struck and killed him?

Answer "Yes" or "No".

King, Mahaffey & Wheeler, Attorneys for the Defendant.

Special Charge No. 18. Requested by Defendant. Given. Hugh Carney, Judge.

[File endorsement omitted.]

[fol. 24] [Title omitted]

GENTLEMEN OF THE JURY: Answer the following: Could D. R. Ferguson by the exercise of ordinary care for his own safety, and with knowledge of the schedule time for the arrival of said train, have heard or seen such train approaching in time to have avoided injury to himself therefrom by the use of such ordinary care on his part, although the whistle on said train was not blown for the station at Leesville, and although the bell on said train was not rung while said train was passing through the yard at Leesville? Answer "Yes" or "No".

King, Mahaffey & Wheeler, Attorneys for the Defendant.

Special Issue No. 19. Requested by Defendant. Given. Hugh Carney, Judge.

[File endorsement omitted.]

[fol. 25] [Title omitted]

GENTLEMEN OF THE JURY: In estimating the amount of damages which has been sustained on account of the death of D. R. Ferguson by his children, you cannot take into consideration any interest the attorneys for the plaintiff may have in the recovery, and cannot award any larger sum as damages on account of the fact that attorneys' fees or other expenses may have to be paid out of the amount of the recovery, in the event the plaintiff should recover.

King, Mahaffey & Wheeler, Attorneys for the Defendant.

Special Charge No. Fourteen. Requested by Defendant. Given. Hugh Carney, Judge.

[File endorsement omitted.]

[Title omitted]

GENTLEMEN OF THE JURY: In considering and formulating your answers to the questions or special issues presented [fol. 26] to you the Court instructs you that you cannot talk about or consider in any way what effect your answers

to the questions submitted to you will have on the final disposition of the case—that is, you cannot discuss or consider whether the plaintiff or the defendant will win as a result of the way in which you answer the questions, but you will answer each question according to the evidence introduced on this trial.

You are further instructed that you must not inquire about, discuss or consider anything which you may have heard relative to a former trial of this case, or the result of such trial in connection with your deliberations on this trial.

Given. Hugh Carney, Judge.

[File endorsement omitted.]

[Title omitted]

The remarks of Mr. Jones Atty. for plaintiff that when deceased was killed that "the sleuths and hawkshaws were turned loose on him—the special agents, is improper argument and you will disregard it.

Given. Hugh Carney, Judge.

[fol. 27] [File endorsement omitted.]

In District Court of Bowie County

[Title omitted]

Defendant's Requested Special Issues Refused—Filed November 19, 1924

Gentlemen of the Jury: Has the Plaintiff proved by a preponderance of the evidence introduced on the trial of this cause that the defendant's agents and servants in charge of the engine pulling the passenger train which is alleged to have struck and killed D. R. Ferguson failed to

sound the whistle thereof in approaching its yard and station at Leesville, Louisiana?

Answer "Yes" or "No."

King, Mahaffey & Wheeler, Attorneys for the Defendant.

Special Charge No. Two. Requested by the Defendant. Refused because covered by main charge. Hugh Carney, Judge.

[fol. 28] [Title omitted]

GENTLEMEN OF THE JURY: Has the plaintiff proved by a preponderance of the evidence introduced on the trial of this cause that the defendant's agents and servants in charge of the locomotive which is alleged to have struck and killed D. R. Ferguson failed to ring the bell thereon while such locomotive was being run through its yard at Leesville, Louisiana?

Answer "Yes" or "No."

Special Charge No. Three, Requested by Defendant.

King, Mahaffey & Wheeler, Attorneys for the Defendant.

Refused because covered by main charge. Hugh Carney, Judge.

[File endorsement omitted.]

[fol. 29] [Title omitted]

GENTLEMEN OF THE JURY: Has the Plaintiff proved by a preponderance of the evidence introduced on the trial of this cause, that D. R. Ferguson was caused to be killed by reason of the failure of the defendant to dim the lights on its locomotive which is alleged to have struck and killed him?

Answer "Yes" or "No."

King, Mahaffey & Wheeler, Attorneys for the Defendant.

Special Charge No. Six, Requested by Defendant. Refused, because covered by main charge. Hugh Carney, Judge.

[File endorsement omitted.]

[Title omitted]

Has the plaintiff proved by a preponderance of the evidence introduced on the trial of this cause that the failure of the defendant to dim the lights on its locomotive either caused, or contributed to cause the death of D. R. Fer-
[fol. 30] guson?

Answer "Yes" or "No."

King, Mahaffey & Wheeler, Attorneys for the Defendant.

Special Issue No. Seven, Requested by Defendant. Refused, because covered by main charge. Hugh Carney, Judge.

[File endorsement omitted.]

[Title omitted]

GENTLEMEN OF THE JURY: Has the Plaintiff proved by a preponderance of the evidence introduced on the trial of this cause that the failure, if there was a failure, on the part of its agents and servants in charge of its locomotive to sound the whistle thereof in approaching its station at Leesville, Louisiana, either caused, or contributed to cause the death of D. R. Ferguson?

Answer "Yes" or "No."

King, Mahaffey & Wheeler, Attorneys for the Defendant.

Special Issue No. Eight, Requested by Defendant. Refused, because covered by main charge. Hugh Carney, Judge.

[fol. 31] [File endorsement omitted.]

[Title omitted]

GENTLEMEN OF THE JURY: Has the plaintiff proved by a preponderance of the evidence introduced upon the trial of this cause that the failure, if there was a failure, on the part of its servants in charge of its locomotive to ring the bell thereon, while said locomotive was passing through the

defendant's yard at Leesville, Louisiana, caused, or contributed to cause the death of D. R. Ferguson?

Answer "Yes" or "No."

King, Mahaffey & Wheeler, Attorneys for the Defendant.

Special Issue No. Nine, Requested by Defendant. Refused, because covered by main charge. Hugh Carney, Judge.

[File endorsement omitted.]

[fol. 32] [Title omitted]

Gentlemen of the Jury: Did D. R. Ferguson know the schedule time for the arrival of the train which is alleged to have struck and killed him at Leesville, Louisiana?

Answer "Yes," or "No.)

King, Mahaffey & Wheeler, Attorneys for the Defendant.

Special Issue No. Ten, Requested by Defendant. Refused because it was undisputed by plaintiff but that he did know. Hugh Carney, Judge.

[File endorsement omitted.]

[Title omitted]

Gentlemen of the Jury: Has the plaintiff proved by a preponderance of the evidence introduced upon the trial of this cause that the speed at which the train was run through the defendant's yard at Leesville on the night that D. R. Ferguson was killed, either caused, or contributed to cause the death of D. R. Ferguson?

[fol. 33] Answer "Yes" or "No."

King, Mahaffey & Wheeler, Attorneys for the Defendant.

Special Issue No. Twelve, Requested by Defendant. Refused, because covered by main charge. Hugh Carney, Judge.

[File endorsement omitted.]

[Title omitted]

GENTLEMEN OF THE JURY: What do you find from the evidence was the proximate cause of D. R. Ferguson's death.

King, Mahaffey & Wheeler, Attorneys for the Defendant.

Special Issue No. Thirteen. Requested by Defendant. Refused. Hugh Carney, Judge.

[File endorsement omitted.]

[fol. 34] [Title omitted]

Comes now the defendant at the conclusion of the plaintiff's evidence and moves that the court instruct the jury to return a verdict for the defendant, for the reason that the plaintiff has offered no evidence from which the jury could reasonably find that the death of D. R. Ferguson was caused, or contributed to by any negligence of the defendant, its agents, servants or employees.

King, Mahaffey & Wheeler, Attorneys for Defendant.

Refused. Hugh Carney, Judge.

[File endorsement omitted.]

[Title omitted]

Now at the conclusion of all the evidence in this cause, comes the defendant and moves and prays the Court to instruct the jury to return a verdict for the defendant, because there has been no evidence introduced upon the trial [fol. 35] of this cause from which the jury could legally find that the death of D. R. Ferguson was caused in whole, or in part, by any negligence on the part of the defendant

King, Mahaffey & Wheeler, Attorneys for the Defendant.

Refused. Hugh Carney, Judge.

[File endorsement omitted]

In District Court of Bowie County

[Title omitted]

Defendant's Bills of Exceptions and Orders Settling Same—Filed January 9, 1925

No. 1

Be it Remembered that upon the trial of the above styled and numbered cause, the plaintiff was permitted, over the objection of the defendant to prove by his witness, Mrs. Ona Carlisle, that the train alleged to have killed the deceased, Ferguson, in approaching the depot and passing through the yard at Leesville, Louisiana, on the night he was killed, was running, it seemed to her, considerably faster than other trains usually came in there, and she guessed was running about 15 or 20 miles faster.

When this testimony was offered, the defendant objected to the witness being permitted so to testify, because she was not shown to have sufficient knowledge to judge the speed of a train, and also objected because some trains might have been running 15 or 20 miles faster than other [fol. 36] trains.

In order to qualify this witness as an expert, the plaintiff thereupon proved by her that she had ridden in automobiles and on trains and had observed the speedometer on automobiles, and that such passenger train was not the first train that had ever come in there, and that she had seen the train lots of times.

The court overruled the foregoing objections, and permitted the witness to testify as above stated, to which action of the court the defendant then and there, in open court, duly excepted, and here now tenders this Bill of Exceptions No. 1, and prays that it be approved and filed as a part of the record in this cause.

King, Mahaffey & Wheeler, Attorneys for Defendant.

Approved and ordered filed. Hugh Carney, Judge.

[File endorsement omitted]

No. 2

Be it remembered that upon the trial of the above styled and numbered cause, the plaintiff, over the objection of the [fol. 37] defendant, was permitted to prove by his witness, Creal Carlisle, that the train which is alleged to have struck and killed the deceased, Ferguson, on the night the deceased was killed, ran into Leesville and through the yards at a speed witness would say anywhere from 30 to 35 miles an hour, probably more or less.

When this testimony was offered, the defendant objected to its introduction, because the witness was not shown to have such experience in the operation of trains as to enable him to qualify as having ability to judge the speed of a train. In an attempt to qualify him so to testify, the plaintiff proved by him that he had ridden on trains and had been working where they would come by every day; that he had been building dirt roads along the side of railroads, and where trains ran by, and had ridden on passenger trains a right smart, and had driven an automobile with a speedometer on it, and had observed the speed of it, and that he judged he was qualified to tell about how fast the train was running as it went into Leesville.

The court overruled the defendant's objection to the testimony of this witness, and he was permitted to testify as above stated, to which action of the court the defendant then and there in open court, duly excepted, and here now tenders his Bill of Exception No. 2, and prays that it be approved and filed as a part of the record of this cause.

King, Mahaffey & Wheeler, Attorneys for Defendant.

Approved and ordered filed. Hugh Carney, Judge.

[fol. 38] No. 3

Be It Remembered that at the close of the plaintiff's evidence in this cause, the defendant moved that the court instruct the jury to return a verdict in its favor, because the plaintiff had failed to prove that the defendant was guilty of any negligence, and if guilty of any negligence, that it

failed to prove that such negligence proximately resulted in the death of the deceased, Mr. Ferguson, the testimony going no further than to show circumstantially that the deceased was killed by the defendant's train.

The court overruled such motion, to which ruling of the court the defendant then and there, in open court, duly excepted, and here now tenders its Bill of Exceptions No. 3, and prays that it be approved and filed as a part of the record of this cause.

King, Mahaffey & Wheeler, Attorneys for Defendant.

Approved and ordered filed. Hugh Carney, Judge.

[fol. 39] No. 4

Be it remembered that on the trial of the above styled and numbered cause, and at the conclusion of all of the evidence introduced herein, and before the court had charged the jury herein, the plaintiff prepared and submitted to the court the following motion, which, omitting formal parts, is as follows:

"Now, at the conclusion of all the evidence in this cause, comes the defendant and moves and prays the Court to instruct the jury to return a verdict for the defendant, because there has been no evidence introduced upon the trial of this cause from which the jury could legally find that the death of D. R. Ferguson was caused in whole, or in part, by any negligence on the part of the defendant."

The court, after hearing and considering such motion, overruled the same, to which ruling of the court the defendant then and there, in open court, duly excepted, and here now tenders its bill of Exceptions No. 4, and prays that it be approved and filed as a part of the record of this cause.

King, Mahaffey & Wheeler, Attorneys for Defendant.

[fol. 40] Approved and ordered filed. Hugh Carney, Judge.

No. 5

Be it remembered that on the trial of the above styled and numbered cause, and before the Court's charge had been submitted to the jury, the defendant prepared, in writ-

ing, and requested the court to submit to the jury, its Special Charge or Issue No. 3, which, omitting formal portions, is as follows:

"Has the plaintiff proved by a preponderance of the evidence introduced on the trial of this cause that the defendant's agents and servants in charge of the locomotive which is alleged to have struck and killed D. R. Ferguson failed to ring the bell thereon while such locomotive was being run through its yard at Leesville, Louisiana?

Answer 'Yes' or 'No.' "

The court refused to submit such Special Charge to the jury, on the ground that it had been covered by the main charge, to which action of the court the defendant then [fol. 41] and there, in open court, duly excepted, and here now tenders his Bill of Exceptions No. 5, and prays that the same be approved and filed as a part of the record of this cause.

King, Mahaffey & Wheeler, Attorneys for Defendant.

Approved and ordered filed. Hugh Carney, Judge.

No. 6

Be it remembered that upon the trial of the above styled and numbered cause, and before the Court's charge had been submitted to the jury, the defendant prepared, in writing, and requested the court to submit to the jury, its Special Charge No. Two, which, omitting formal portions, is as follows:

"Has the plaintiff proved by a preponderance of the evidence introduced on the trial of this cause that the defendant's agent and servants in charge of the engine pulling the passenger train which is alleged to have struck and killed D. R. Ferguson failed to sound the whistle thereof [fol. 42] in approaching its yard and station at Leesville, Louisiana?

Answer 'Yes' or 'No.' "

The court refused to submit such Special Charge to the jury, on the ground that it had been covered by the main charge, to which action of the court the defendant then

and there, in open court, duly excepted, and here now tenders his Bill of Exceptions No. 6, and prays that the same be approved and filed as a part of the record of this cause.

King, Mahaffey & Wheeler, Attorneys for Defendant.

Approved and ordered filed. Hugh Carney, Judge.

No. 7

Be it remembered that upon the trial of the above styled and numbered cause, and before the Court's charge had been submitted to the jury, the defendant prepared, in writing, and requested the court to submit to the jury, its Special Charge No. Six, which, omitting formal portions, is as follows:

[fol. 43] "Has the plaintiff proved by a preponderance of the evidence introduced on the trial of this cause, that D. R. Ferguson was caused to be killed by reason of the failure of the defendant to dim the lights on its locomotive which is alleged to have struck and killed him?

Answer 'Yes' or 'No.' "

The court refused to submit such Special Charge to the jury, on the ground that it had been covered by the main charge, to which action of the court the defendant then and there, in open court, duly excepted, and here now tenders his Bill of Exceptions No. 7, and prays that the same be approved and filed as a part of the record of this cause.

King, Mahaffey & Wheeler, Attorneys for Defendant.

Approved and ordered filed. Hugh Carney, Judge.

No. 8

Be It Remembered that upon the trial of the above styled and numbered cause, and before the Court's main charge had been submitted to the jury, the defendant prepared, in writing, and requested the court to submit to the jury, [fol. 44] its Special Charge No. 7, which, omitting formal portions, is as follows:

"Has the plaintiff proved by a preponderance of the evidence introduced on the trial of this cause that the failure

of the defendant to dim the lights on its locomotive either caused, or contributed to cause the death of D. R. Ferguson?

Answer 'Yes' or 'No.' "

The court refused to submit such Special Charge to the jury, on the ground that it had been covered by the main charge, to which action of the court the defendant then and there, in open court, duly excepted, and here now tenders his Bill of Exceptions No. 8, and prays that the same be approved and filed as a part of the record of this cause.

King, Mahaffey & Wheeler, Attorneys for Defendant.

Approved and ordered filed. Hugh Carney, Judge.

[fol. 45] No. 9

Be It Remembered that upon the trial of the above styled and numbered cause, and before the Court's main charge had been submitted to the jury, the defendant prepared, in writing, and requested the court to submit to the jury, its Special Charge No. 8, which, omitting formal portions, is as follows:

"Has the plaintiff proved by a preponderance of the evidence introduced on the trial of this cause that the failure, if there was a failure, on the part of its agents and servants in charge of its locomotive to sound the whistle thereof in approaching its station at Leesville, Louisiana, either caused, or contributed to cause the death of D. R. Ferguson?

Answer 'Yes' or 'No.' "

The court refused to submit such Special Charge to the jury, on the ground that it had been covered by the main charge, to which action of the court the defendant then and there, in open court, duly excepted, and here now tenders his Bill of Exceptions No. 9, and prays that the same be approved and filed as a part of the record of this cause.

King, Mahaffey & Wheeler, Attorneys for Defendant.

Approved and ordered filed. Hugh Carney, Judge.

[fol. 46] No. 10

Be It Remembered that upon the trial of the above styled and numbered cause, and before the Court's main charge had been submitted to the jury, the defendant prepared, in writing, and requested the court to submit to the jury, its Special Charge No. 9, which, omitting formal portions, is as follows:

"Has the plaintiff proved by a preponderance of the evidence introduced upon the trial of this cause that the failure, if there was a failure, on the part of the *its* servants in charge of its locomotive, to ring the bell thereon, while said locomotive was passing through the defendant's yard at Leesville, Louisiana, caused, or contributed to cause the death of D. R. Ferguson?

Answer 'Yes' or 'No.'"

The court refused to submit such Special Charge to the jury, on the ground that it had been covered by the main [fol. 47] charge, to which action of the court the defendant then and there, in open court, duly excepted, and here now tenders his Bill of Exceptions No. 10, and prays that the same be approved and filed as a part of the record of this cause.

King, Mahaffey & Wheeler, Attorneys for Defendant.

Approved and ordered filed. Hugh Carney, Judge.

No. 11

Be It Remembered that upon the trial of the above styled and numbered cause, and before the Court's main charge had been submitted to the jury, the defendant prepared, in writing, and requested the court to submit to the jury, its Special Charge No. 10, which, omitting formal portions, is as follows:

"Did D. R. Ferguson know the schedule time for the arrival of the train which is alleged to have struck and killed him at Leesville, Louisiana?

Answer 'Yes' or 'No.'"

[fol. 48] The court refused to submit such Special Charge to the jury, on the ground that it was undisputed by plaintiff but that he did know, to which action of the court the

defendant then and there, in open court, duly excepted, and here now tenders his bill of exceptions No. 11, and prays that the same be approved and filed as a part of the record of this cause.

King, Mahaffey & Wheeler, Attorneys for Defendant.

Approved and ordered filed, with qualification that this was refused because there was no dispute but what deceased did know the schedule time for the arrival of the train. Hugh Carney, Judge.

No. 12

Be It Remembered that upon the trial of the above styled and numbered cause, and before the Court's charge has been submitted to the jury, the defendant prepared, in writing, and requested the court to submit to the jury its [fol. 49] Special Charge No. 12, which, omitting formal parts, reads as follows:

"Has the plaintiff proved by a preponderance of the evidence introduced upon the trial of this cause, that the speed at which the train was run through the defendant's yard at Leesville, on the night that D. R. Ferguson was killed either caused, or contributed to cause the death of D. R. Ferguson?

Answer 'Yes' or 'No.'"

The court refused to submit such Special Charge to the jury, because it had been covered by the main charge, to which action of the court the defendant then and there in open court, duly excepted, and here now tenders his Bill of Exceptions No. 12, and prays that the same be approved and filed as a part of the record of this cause.

King, Mahaffey & Wheeler, Attorneys for Defendant.

Approved and ordered filed. Hugh Carney, Judge.

[fol. 50] No. 13

Be it Remembered that upon the trial of the above styled and numbered cause, and before the Court's main charge had been submitted to the jury, the defendant prepared, in writing, and requested the court to submit to the jury its

Special Charge No. 13, which, omitting formal portions, reads as follows:

"GENTLEMEN OF THE JURY: What do you find from the evidence was the proximate cause of D. R. Ferguson's death?"

The court refused to submit such Special Charge to the jury, to which action of the court the defendant then and there, in open court, duly excepted, and here now tenders his Bill of Exceptions No. 13, and prays that the same be approved and filed as a part of the record of this cause.

King, Mahaffey & Wheeler, Attorneys for Defendant.

Approved and ordered filed. Hugh Carney, Judge.

[fol. 51] No. 14

Be it remembered that on the trial of the above styled and numbered cause, and after the court, at the request of the plaintiff, had decided to submit this cause to the jury upon Special Issues, the Court prepared his charge, embodying the Special Issues submitted by him to the jury, and after the preparation of such charge, and before it was read to the jury, the Court presented the same to the attorneys for the defendant, in order to permit them to make such objections and exceptions thereto as they migh- deem proper, and after inspecting such charge of the Court, the attorneys for the defendant, in open court, and before such charge was read or presented to the jury, properly made, in writing, the following objections and exceptions to said charge, to-wit:

1

The defendant objects and excepts to the Court submitting to the jury Special Issue or question No. One—

First. Because there is no evidence in the record from which the jury could reasonably find that the failure to dim the headlight on the engine pulling the defendant's passenger train on February 12th, 1922, was a proximate or contributing cause of or to the death of D. R. Ferguson, the deceased.

[fol. 52] Second. Because the testimony shows that the engineer in charge of such engine, in failing to dim the headlight of the engine in entering and passing through the yards at Leesville was acting in accordance with the custom and regulations of defendant in the operation of its railroad, and there has been no testimony introduced to show that it was dangerous to run said engine into and through said yard without dimming the headlight. Third. Because negligence cannot be predicated upon the observance of a custom or usage of the defendant as to the manner of conducting its business, unless it be shown that such method or manner employed was one not usually or customarily pursued by railroads, then it would be an invasion of defendant's rights to conduct its business as in its judgment would best promote the same, to submit to the jury the issues of negligence, as to such method.

2

The defendant objects and excepts to the submission by the Court of Special Issue or question No. Two, because there has been introduced no evidence from which the jury could reasonably find that the failure to dim the headlight of the engine at the time and place D. R. Ferguson was killed, caused the said D. R. Ferguson to be blinded, or that the failure to dim said headlight was the proximate cause of the death of said D. R. Ferguson, there having been introduced no evidence whatever, to prove that D. R. Ferguson was blinded by such headlight, or that the failure to dim said headlight in any sense caused, or contributed to cause him to be struck or injured by said train.

3

The defendant objects and excepts to the Court submitting to the jury special Issue No. Three in the form in which is framed, because there is no testimony from which [fol. 53] the jury could reasonably find that such train was being operated at a dangerous rate of speed. The defendant moreover objects and excepts to such issue No. Three, because there is no evidence in the record from which the

jury could find that the speed at which said train was operated through the yards at Leesville on the night that D. R. Ferguson was killed either caused or contributed to cause his death.

4

The defendant objects and excepts to Special Issue or question No. Four being submitted to the jury, because no evidence has been introduced to show that the rate of speed at which said train was operated, was a dangerous one, and because there has been no testimony introduced from which the jury could reasonably find that the rate of speed at which the train was operated through the yards at Leesville on the night that D. R. Ferguson was killed was negligence.

5

The defendant objects and excepts to the Court submitting to the jury Special Issue or question No. Five, because there has been introduced on the trial of this cause no evidence from which the jury could reasonably find that the speed at which said passenger train was operated through its yard at Leesville on the night D. R. Ferguson was killed, was either a proximate or remote cause of the death of D. R. Ferguson.

6

The defendant objects and excepts to the Court submitting to the jury special issue or question No. Six, because there is no evidence in the record from which the jury could reasonably find that a failure to ring the bell on said engine while it was passing through the yard at Leesville on the night D. R. Ferguson was killed, was a proximate cause [fol. 54] of, or contributing cause to the death of D. R. Ferguson, the deceased; and because no evidence has been introduced to prove that D. R. Ferguson did not know of the approach of such train in time to avoid being injured thereby.

The defendant objects and excepts to the Court submitting to the jury Special Issue or Question No. Seven, because no evidence has been introduced from which the jury could reasonably find that the failure, if failure there was,

to ring the bell of said engine caused, or contributed to cause the death of said D. R. Ferguson, and the question of the failure or not to ring the bell, is an immaterial question.

8

The defendant objects and excepts to the Court submitting to the jury Special Issue or Question No. Eight because there has been introduced no testimony from which the jury could find that the failure, if failure there was, to ring the bell of the engine while same was passing through the yards of the defendant at Leesville on the night that D. R. Ferguson was killed, was either a proximate or contributing cause of the death of D. R. Ferguson.

9

The defendant objects and excepts to the Court submitting to the jury Special Issue or Question No. Nine, because there has been no evidence inroduced to show that the failure, if any, to sound the whistle of the engine was a proximate cause of the death of D. R. Ferguson.

10

The defendant objects and excepts to the Court submitting to the jury Special Issue or Question No. Ten, because [fol. 55] there has been introduced no evidence from which the jury could reasonably find that the failure, if any, to sound the whistle of said engine was a proximate or contributing cause of the death of D. R. Ferguson, and therefore, the question as to whether the failure to sound the whistle is an immaterial issue in this cause.

11

The defendant objects and excepts to the Court submitting to the jury special Issue or Question No. Eleven, because there has been introduced no evidence from which the jury could reasonably find that the failure to sound the whistle of the engine was a proximate cause of the death of D. R. Ferguson.

12

The defendant objects and excepts to the form in which each of the issues in this cause have been submitted to the jury, because the Court has not clearly indicated with respect to each of said special issues or questions, upon whom the burden of proof rests, and the issues are framed in such a way as to lead the jury to believe that they should be answered in the affirmative. This applies to each of the special issues.

The Court, after hearing and considering each and all of the foregoing objections and exceptions to the Charge, overruled each and all of such objections, to which action of the court the defendant then and there, in open court, duly excepted, and here tenders its Bill of Exceptions No. 14, and prays that she same be approved and filed as a part of the record of this cause.

King, Mahaffey & Wheeler, Attorneys for Defendant.

[fol. 56] Approved and ordered filed. Hugh Carney, Judge.

In District Court of Bowie County

Verdict—Filed November 20, 1924

We, the jury, answer the special issues submitted to us as follows:

To Special Issue No. 1, we answer: Yes.
To Special Issue No. 2, we answer: Yes.
To Special Issue No. 3, we answer: Yes.
To Special Issue No. 4, we answer: Yes.
To Special Issue No. 5, we answer: Yes.
To Special Issue No. 6, we answer: Yes.
To Special Issue No. 7, we answer: Yes.
To Special Issue No. 8, we answer: Yes.
To Special Issue No. 9, we answer: Yes.
To Special Issue No. 10, we answer: Yes.
To Special Issue No. 11, we answer: Yes.
To Special Issue No. 12, we answer: No.

To Special Issue No. 13, we answer: $13,000.00.
To Special Issue No. 14, we answer: No.
To Special Issue No. 15, we answer: No.
To Special Issue No. 16, we answer: $—.
To Special Issue No. 17, we answer: No.
To Special Issue No. 18, we answer: No.
To Special Issue No. 19, we answer: No.

J. W. Evans, Foreman.

[fol. 57] [File endorsement omitted.]

IN DISTRICT COURT OF BOWIE COUNTY

[Title omitted]

JUDGMENT

On this the 17th day of November, 1924, came on to be heard the above entitled cause, and the parties plaintiff and defendant appeared by their attorneys, and announced ready for trial, and thereupon came a jury of twelve good and lawful men, to-wit: J. W. Evans, Foreman and eleven others, and the said cause proceeded from day to day until the 19th day of November, 1924, when all of the evidence having been introduced the Court submitted this cause to the jury on special issues, and after the argument of the said cause by counsel of plaintiff and defendant the jury retired to consider their verdict, and after having duly considered the same returned into court their verdict answering each and all of the special issues so submitted to them, in favor of the plaintiff, and assessed the damages at $13,000.00.

The said special issues so submitted to the said jury by the Court, and their answers thereto being as follows, to-wit:

No. 1. Do you believe from the evidence that the failure of defendant's servants or agents in charge of the operation of the passenger train which struck and killed D. R. [fol. 58] Ferguson in the yards at Leesville, La., on or about Feb. 12th, 1922, to dim the headlight of the engine of said train, as the said train approached the place where

the said D. R. Ferguson was struck, was negligence on the part of said servants or agents in charge of said train?

Answer. Yes.

No. 2. Do you believe from the evidence that the failure to dim the headlight of said engine at said time and place caused the said D. R. Ferguson to be blinded and thereby was a proximate cause of the death of the said D. R. Ferguson?

Answer. Yes.

No. 3. Do you believe from the evidence that the train, which struck the said D. R. Ferguson, at the time it approached the place in the yard at Leesville where the said D. R. Ferguson was struck, was being operated at a dangerously and unusually high rate of speed?

Answer. Yes.

No. 4. If you answer No. 3 "No" you need not answer this issue. If you answer No. 3 "Yes" then was such rate of speed of operation of said train, at said time, and place, negligence, as that term has hereinbefore been defined to you?

Answer. Yes.

No. 5. If you answer No-. 3 or 4 "No" then you need not answer this issue. If you answer both No. 3 and No. 4 "Yes," then was such rate of speed of operation of said train a proximate cause of the death of the said D. R. Ferguson, as that term—"proximate cause"—has herein- [fol. 59] before been defined to you?

Answer. Yes.

No. 6. Do you believe from the evidence that the servants or agents of defendant in charge of the engine of said train which struck the said D. R. Ferguson, on or about the aforesaid time and place, failed to ring the bell of said engine, as said train approached the place where the said D. R. Ferguson was struck?

Answer. Yes.

No. 7. If you answer No. 6 "No," then you need not answer this issue. If you answer No. 6 "Yes" then was the failure to ring the bell of said engine, at said time and

place, negligence, as that term is hereinbefore defined to you?

Answer. Yes.

No. 8. If you answer No. 6 or No. 7 "No," then you need not answer this issue. If you answer No. 6 and No. 7 "Yes," then was such failure to ring the bell of said engine, at said time and place, a proximate cause of the death of the said D. R. Ferguson, as that term—proximate cause—has hereinbefore been defined to you.

Answer. Yes.

No. 9. Do you believe from the evidence that the servants or agents of defendant in charge of the engine of said train which struck the said D. R. Ferguson, on or about the time and place aforesaid, failed to sound the whistle of said engine, as said train approached the yards wherein the said D. R. Ferguson was working?

Answer. Yes.

[fol. 60] No. 10. If you answer No. 9 "No," then you need not answer this issue. If you answer No. 9, "yes," then was the failure to sound the whistle of said engine negligence, as that term is hereinbefore defined to you?

Answer. Yes.

No. 11. If you answer No. 9 or No. 10 "No," then you need not answer this issue. If you answer No. 9 and No. 10 "Yes," then was the failure to sound the whistle of said engine a proximate cause of the death of the said D. R. Ferguson, as that term—proximate cause—is hereinbefore defined to you?

Answer. Yes.

No. 12. Do you believe from the evidence that the deceased, D. R. Ferguson, by reason of his employment as car inspector assumed the risk of injury such as cause- his death?

Answer. No.

No. 13. What amount of money, if paid in cash now, will fairly and reasonably compensate the surviving children of the said D. R. Ferguson for their pecuniary damages, if any, resulting from his death?

Answer. $13,000.00.

No. 14. Do you believe that the deceased, D. R. Ferguson, was intoxicated at the time he was struck and killed in the yards at Leesville, on or about Feb. 12th, 1922?

Answer. No.

No. 15. Do you believe that the deceased, D. R. Ferguson was guilty of contributory negligence in carelessly or while intoxicated placing himself in such position upon or near defendant's main track that he was struck and killed by an incoming passenger train in the yards at Leesville on or about Feb. 12th, 1922?

[fol. 61] Answer. No.

No. 16. If you answer No. 15 "No", you need not answer this issue. If you answer No. 15 "Yes", then how much do you believe from the evidence the damages, if any, accruing to plaintiff by reason of said death of said D. R. Ferguson, should be diminished by reason of the contributory negligence of deceased?

Answer. $—.

No. 17. If you should find from the evidence that the agents and servants of defendant in charge of its locomotive failed to sound the whistle thereon in approaching its station at Leesville, Louisiana, and also failed to ring the bell on such engine while it was being run through its yard at Leesville, then from the evidence, you will answer this question:

Could D. R. Ferguson, in the exercise of ordinary care for his own safety, and assuming that he knew the time for the arrival of such train, have discovered the approach of such train in time to have prevented being struck thereby?

Answer. No.

No. 18. Could D. R. Ferguson, by the use of ordinary care on his part, have avoided being struck by the locomotive which is alleged to have struck and killed him?

Answer. No.

No. 19. Could D. R. Ferguson, by the exercise of ordinary care for his own safety, and with knowledge of the schedule time for the arrival of said train, have heard or seen such train approaching in time to have avoided injury to himself therefrom b/ the use of such ordinary care on his part,

[fol. 62] although the whistle on said train was not blown for the station at Leesville, and although the bell on said train was not rung while said train was passing through the yard at Leesville?

Answer. No.

The said special issues all having been answered in favor of the plaintiff, it is therefore, on this Dec. 15th 1924, ordered, adjudged, decided and decreed that the plaintiff, Leonard Jones, Administrator, do have and recover of and from the defendant, the Kansas City Southern Railway Company, for the use and benefit of the following children of D. R. Ferguson, deceased, to-wit: Jewel Ferguson, now Mrs. Jewel Lewis, Rupert Ferguson, and Otis Ferguson, the sum of Thirteen Thousand ($13,000.00) Dollars actual damages, and all costs of suit, for all of which let execution issue.

In the District Court of Bowie County

[Title omitted]

Motion for New Trial—Filed November 21, 1924

Now comes the defendant in the above styled cause, and moves and prays that court set aside each and all of the findings of the jury made in response to the special issues, submitted to the jury by the court; and that the court grant a new trial of this cause, because the findings of the jury are not supported by the evidence, are without any evidence to support them and are contrary to the evidence; and further because the court erred in submitting to the jury each and all of the issues which were answered af- [fol. 63] firmatively by the jury; and further because the court erred in refusing to submit to the jury each and all of the special issues requested by the defendant, and because the verdict of the jury is grossly excessive in amount.

All of which is respectfully prayed.

King, Mahaffey & Wheeler, Attorneys for Defendant K. C. S. Ry Co.

[File endorsement omitted.]

In District Court of Bowie County

[Title omitted]

Amended Motion for New Trial—Filed December 11, 1924

Now comes the defendant, and by leave of the court, files the following Amended Motion for the Court to set aside the findings of the jury made in this cause, and grant it a new trial thereof, and for such amended motion, says that the Court should set aside the finding of the jury made in response to the Special Issues submitted in this cause, and should grant a new trial hereof, for the reasons which are hereinafter stated as follows, to-wit:

[fol. 64] 1

Because the findings of the jury in response to Special Issue No. One, submitted to them is contrary to the evidence, and is unsupported by any evidence introduced upon the trial of this cause, in that no testimony was introduced on the trial of this cause which would have authorized the jury to find that the failure of defendant's servants to dim the headlight on the engine of the train alleged to have struck and killed the deceased, D. R. Ferguson, was negligence. On the other hand, the evidence showed that such servants, in failing to dim the headlight, were acting in accordance with the rules and regulations of the defendant about which the deceased well knew, and there was no testimony to show that other railroads pursued and different custom to that pursued by the defendant in similar circumstances, but on the other hand, it was shown that reputable railroad companies, in running their passenger trains on main lines into stations and through yards, failed to dim the headlights thereon, and that the custom of keeping such headlights burning in such circumstances was deemed the part of wisdom by experienced railroad men.

2

Because the finding of the jury in response to Special Issue No. 2 submitted by the court is unsupported by any evidence introduced on the trial of this cause, in that no evidence was introduced from which the jury could find

that the failure to dim the headlight on the engine alleged to have struck and killed the deceased, D. R. Ferguson, in any way or manner caused him to be blinded thereby, and thereby proximately caused or contributed to cause his death.

3

Because the finding of the jury in response to Special Issue No. 3 submitted to them by the Court is unsupported [fol. 65] by the testimony, or by any testimony introduced on the trial of this cause, in that there was no testimony introduced from which the jury were authorized to find that the train which struck and killed D. R. Ferguson, was, at the time he was struck and killed, being operated through defendant's yard at Leesville, Louisiana, at a dangerous and unusually high rate of speed.

4

Because the finding of the jury in response to Special Issue No. 4, submitted to them by the Court is contrary to the evidence and is unsupported by any evidence introduced on the trial of this cause, in that no testimony was introduced from which the jury could rationally find that the rate of speed at which defendant's train that is alleged to have struck and killed the deceased, was at the time the deceased was killed, being operated at such rate of speed as to constitute negligence.

5

Because the finding of the jury in response to Special Issue No. 5 is unsupported by the testimony, in that no testimony was introduced at the trial from which the jury could rationally have found, or were authorized to have found that the speed at which the train was operated at the time deceased was struck and killed, was in truth or fact a proximate cause of the death of the deceased, D. R. Ferguson.

6

Because the finding of the jury in response to Special Issue No. 6 is contrary to the evidence and is unsupported [fol. 66] by the evidence, in that the great preponderance

of the disinterested testimony introduced upon the trial of this cause, showed that there was no failure on the part of the agents and servants of defendant in charge of the engine of the train which is supposed to have struck and killed D. R. Ferguson, to ring the bell of said engine as said train approached the place where the said D. R. Ferguson, was struck.

7

Because the finding of the jury in response to Special Issue No. 7 is contrary to the evidence, and is unsupported by the evidence, in that no evidence was introduced on the trial from which the jury would be authorized to find that the failure to ring the bell of the engine when it approached the place where deceased is supposed to have been struck and killed, was in truth or fact negligence, insofar as the rights of the deceased were concerned.

8

Because the finding of the jury in response to Special Issue No. 8 is unsupported by any evidence introduced on the trial of this cause, in that no evidence was introduced at the time showing or tending to show that a failure to ring the bell on the engine, if in fact there was a failure so to do, was a proximate cause of the death of the deceased, D. R. Ferguson.

9

Because the finding of the jury in response to Special Issue No. 9 is contrary to the overwhelming weight and preponderance of the testimony, in that the overwhelming weight and preponderance of the disinterested testimony introduced upon the trial of this cause, proved that there [fol. 67] was no failure on the part of defendant's agents and servants in charge of the engine of the train which struck D. R. Ferguson, deceased, to sound the whistle of said engine as said train approached the yards wherein the said D. R. Ferguson was working. On the other hand, the overwhelming weight of the disinterested testimony was to the effect that such whistle was sounded as such train approached the yards wherein the said D. R. Ferguson was working.

10

Because the finding of the jury in response to Special Issue No. 10 is contrary to and unsupported by the evidence, in that no evidence was introduced on the trial from which the jury were authorized to find that a failure to sound the whistle of said engine, if in fact there was a failure so to do, constituted negligence, insofar as the rights of the deceased were concerned.

11

Because the finding of the jury, in response to Special Issue No. 11, is contrary to the evidence, and is unsupported by the evidence, for the reason that no testimony was introduced upon the trial of this cause from which the jury were authorized to find that the failure to sound the whistle of the engine, if there was a failure so to do, was a proximate cause of the death of the deceased, D. R. Ferguson.

12

Because the finding of the jury, in response to Special Issue No. 12, is contrary to the undisputed evidence adduced upon the trial of this cause, which was in substance, [fol. 68] and to the effect that the deceased had long been a car inspector in defendant's yard at Leesville, Louisiana; was well acquainted with the location of its tracks, and with the schedule time for the arrival of the train which is alleged to have struck and killed him, and that such train was on time on the night he is alleged to have been struck and killed by said train; that he was well acquainted with the location of the track upon which such train would run when it came into the yard, and was under the duty, in his employment, to look out for and avoid injury from such train.

13

Because the finding of the jury in response to Special Issue No. 13, to the effect that the plaintiff should recover $13,000.00, is unsupported by the testimony, and is a grossly excessive award of damages, in view of the testimony, even if it was admitted that the plaintiff was entitled to recover.

This finding should further be set aside, because the jury, in arriving at the amount, as defendant is informed and believes, and so charges the facts to be, was induced to make this finding greater than it otherwise would have done, because they took into consideration expenditures which Mrs. Ona Carlisle had made and might hereafter make in caring for the minor sons of deceased, and really awarded and intended to award a portion of the amount found by them, to the said Mrs. Carlisle, when in truth and in fact, under the undisputed evidence, she was not entitled to recover in this action, or to have any part of any recovery awarded to her, or to have any right of recovery in her behalf considered by the jury.

[fol. 69] 14

Because the finding of the jury in response to Special Issue No. 14, is contrary to the great weight and preponderance of the evidence, in that the overwhelming weight of the undisputed evidence on this trial showed that the deceased, at the time he was struck and killed, was intoxicated, and that such intoxication had resulted from the recent immoderate use of liquor.

15

Because the finding of the jury in response to Special Issue No. 15 is unsupported by the testimony, and is contrary to any rational hypothesis which can be formulated, in view of the undisputed facts relating to or accounting for the death of the deceased, D. R. Ferguson.

16

Because the court erred in submitting to the jury Special Issue No. 1, reading as follows:

"Do you believe from the evidence that the failure of defendant's servants or agents in charge of the operation of the passenger train which struck and killed D. R. Ferguson in the yards at Leesville, Louisiana, on or about February 12th, 1922, to dim the headlight of the engine of said train, as the said train approached the place where the

said D. R. Ferguson was struck, was negligence on the part of said servants or agents in charge of said train?

Answer 'Yes' or 'No'."

This was error because (1) there is no evidence in the record from which the jury could reasonably find that the failure to dim the headlight on the engine pulling the defendant's passenger train on February 12th, 1922, was a proximate or contributing cause of or to the death of D. R. [fol. 70] Ferguson, the deceased; second, because the testimony shows that the engineer in charge of such engine in failing to dim the headlight of the engine in entering and passing through the yards at Leesville, was acting in accordance with the custom and regulations of defendant in the operation of its railroad, and there was no testimony introduced to show that it was dangerous to run said engine into and through said yard without dimming the headlight; and third, because negligence cannot be predicated upon the observance of a custom or usage of the defendant as to the manner of conducting its business, unless it be shown that such method or manner employed was one not usually or customarily pursued by railroads, and it would be an invasion of defendant's rights to conduct its business as in its judgment would best promote the same, to submit to the jury the issue of negligence as to such method.

17

Because the court erred in submitting to the jury special Issue on Question No. Two, reading as follows:

"Do you believe from the evidence that the failure to dim the headlight of said engine at said time and place caused the said D. R. Ferguson to be blinded and thereby was a proximate cause of the death of the said D. R. Ferguson?

Answer 'Yes' or 'No'."

It was error for the court to submit to the jury this issue or question, because no evidence was introduced on the trial of this cause from which the jury could reasonably find that the failure to dim the headlight of the engine at the time and place D. R. Ferguson was killed, caused the said D. R. Ferguson to be blinded, or that the failure to dim said [fol. 71] headlight was the proximate cause of the death of

said D. R. Ferguson. No evidence was introduced proving, or tending to prove that D. R. Ferguson was blinded by such headlight, or that the failure to dim said headlight in any sense caused or contributed to cause him to be struck or injured by said train.

18

Because the court erred in submitting to the jury Special Issue or Question No. 3, in the form in which it was framed, reading as follows:

"Do you believe from the evidence that the train, which struck the said D. R. Ferguson, at the time it approached the place in the yard at Leesville where the said D. R. Ferguson was struck, was being operated at a dangerously and unusually high rate of speed?

Answer 'Yes' or 'No.' "

This was error, because no testimony was introduced on the trial from which the jury could reasonably find that the train alleged to have struck and killed D. R. Ferguson was being operated at a dangerous rate of speed; and further, because no evidence was introduced from which the jury could find that the speed at which said train was operated through the yards of defendant at Leesville on the night D. R. Ferguson was killed, either caused or contributed to cause his death.

19

Because the court erred in submitting to the jury Special Issue or Question No. 4, reading as follows:

"If you answer No. 3 'No,' you need not answer this Issue. If you answer No. 3 'Yes,' then was such rate of speed of operation of said train at said time and place negligence, as that term has hereinbefore been defined to you?

Answer 'Yes' or 'No.' "

[fol. 72] There was error, because no evidence was introduced on the trial of this cause to show that the rate of speed at which the train was operated was a dangerous one; and further, because no testimony was introduced on the trial from which the jury could reasonably find that the rate of

speed at which the train was operated through the yard at Leesville on the night that D. R. Ferguson was killed, was negligence.

20

Because the court erred in submitting to the jury Special Issue or Question No. 5, reading as follows:

"If you answer No. 3 or No. 4 'No,' then you need not answer this issue. If you answer both No. 3 and No. 4 'Yes' then was such rate of speed of operation of said train a proximate cause of the death of the said D. R. Ferguson, as that term 'proximate cause' has hereinbefore been defined to you?

Answer 'Yes' or 'No.' "

There was error, because there was introduced on the trial of this cause no evidence from which the jury could reasonably find that the speed at which the train was operated through its yard at Leesville on the night D. R. Ferguson was killed, was either a proximate or remote cause of the death of D. R. Ferguson.

21

The court erred in submitting to the jury Special Issue or Question No. 6, reading as follows:

"Do you believe from the evidence that the servants or agents of defendant in charge of the engine of said train which struck the said D. R. Ferguson, on or about the afor- [fol. 73] said time and place, failed to ring the bell of said engine, as said train approached the place where the said D. R. Ferguson was struck?

Answer 'Yes' or 'No.' "

This was error, because no evidence was introduced on the trial from which the jury could reasonably find that a failure to ring the bell on the engine when it was passing through the yard at Leesville on the night D. R. Ferguson was killed, was a proximate cause of or contributing cause to the death of D. R. Ferguson, deceased; and further, because no evidence was introduced to prove that D. R. Fer-

guson did not know of the approach of such train in time to avoid being injured thereby.

22

Because the court erred in submitting to the jury Special Issue or Question No. 7, reading as follows:

"If you answer No. 6 'No', then you need not answer this issue. If you answer No. 6 'Yes', then was the failure to ring the bell of said engine, at said time and place negligence, as that term is hereinbefore defined to you?
Answer 'Yes' or 'No'."

This was error, because no evidence was introduced at the trial from which the jury could reasonably find that the failure, if failure there was to ring the bell of said engine, caused or contributed to cause the death of said D. R. Ferguson, and the question of the failure or not to ring the bell was an immaterial question.

23

Because the court erred in submitting to the jury Special Issue or Question No. 8, reading as follows:

[fol. 74] "If you answer No. 6 or No. 7 'No', then you need not answer this issue. If you answer No. 6 and No. 7 'Yes', then was such failure to ring the bell of said engine, at said time and place, a proximate cause of the death of the said D. R. Ferguson, as that term—proximate cause—has hereinbefore been defined to you?
Answer 'Yes' or 'No'."

This was error, because there was introduced on the trial of the cause no testimony from which the jury could find that the failure, if failure there was, to ring the bell of the engine when the same was passing through the yards of defendant at Leesville on the night that D. R. Ferguson was killed, was either a proximate or contributing cause of the death of D. R. Ferguson.

24

Because the court erred in submitting to the jury Special Issue or Question No. 9, reading as follows:

"Do you believe from the evidence that the servan*st* or agents of the defendant in charge of the engine of said train which struck the said D. R. Ferguson, on or about the time and place aforesaid, failed to sound the whistle of said engine, as said train approached the yards wherein the said D. R. Ferguson was working?

Answer 'Yes' or 'No'."

This was error, because on the trial of this cause, no evidence was introduced to show that the failure, if any, to sound the whistle of the engine, was a proximate cause of the death of D. R. Ferguson, the deceased.

25

Because the court erred in submitting to the jury Special Issue or Question No. 10, reading as follows:

[fol. 75] "If you answer No. 9 'No', then you need not answer this issue. If you answer No. 9 'Yes', then was the failure to sound the whistle of said engine negligence, as that term is hereinbefore de*in*fed to you?

Answer 'Yes' or 'No'."

This was error, because no testimony was introduced on the trial of this cause from which the jury could reasonably find that the failure, if any, to sound the whistle of the engine was a proximate or contributing cause of the death of D. R. Ferguson, and therefore, the question as to *whether* the failure to sound the whistle is an immaterial issue in this cause.

26

Because the court erred in submitting to the jury Special Issue or Question No. 11, reading as follows:

"If you answer No. 9 or No. 10 'No', then you need not answer this issue. If you answer No. 9 and No. 10 'Yes', then was the failure to sound the whistle of said engine a proximate cause of the death of the said D. R. Ferguson, as that term—proximate cause—is hereinbefore defined to you?

Answer 'Yes' or 'No'."

This was error, because there was no evidence introduced upon the trial of this cause from which the jury could

reasonably find that the failure to sound the whistle of the engine was a proximate cause of the death of D. R. Ferguson, deceased.

27

Because the court erred, in the submission of Issues 1 to 11 inclusive, in failing, in connection with each of said issues, to clearly indicate with respect to each, upon which of the parties the burden of proof rested; and further erred in framing such issues, in that they were framed in [fol. 76] such a way as to lead the jury to believe that they should each be answered in the affirmative.

28

Because the court erred in failing and refusing, at the conclusion of the evidence offered by plaintiff, to sustain the motion interposed by the defendant for the court to instruct the jury to return a verdict in its favor.

29

Because the court erred at the conclusion of all the evidence, in refusing, at the request of the defendant, peremptorily to instruct the jury to return a verdict in favor of the defendant.

30

Because the court erred in refusing, at the request of the defendant, properly, and in due time made, to submit its requested Special Issue No. 6, reading as follows:

"Has the plaintiff proved by a preponderance of the evidence introduced on the trial of this cause, that D. R. Ferguson was caused to be killed by reason of the failure of the defendant to dim the lights on its locomotive which is alleged to have struck and killed him?

Answer 'Yes' or 'No'."

31

Because the court erred in refusing, at the request of the defendant properly and in due time made, to submit its requested Special Issue No. 7, reading as follows:

"Has the plaintiff proved by a preponderance of the evidence introduced on the trial of this cause that the failure of the defen-ant to dim the lights on its locomotive either caused, or contributed to cause the death of D. R. Ferguson?
[fol. 77] Answer 'Yes, or 'No'."

32

Because the court erred in refusing, at the request of the defendant properly and in due time made, to submit its requested Special Issue No. 8, reading as follows:

"Has the plaintiff proved by a preponderance of the evidence introduced on the trial of this cause that the failure if there was a failure, on the part of its agents and servants in charge of its locomotive to sound the whistle thereof in approaching its station at Leesville, Louisiana, either caused, or contributed to cause the death of D. R. Ferguson?
Answer 'Yes' or 'No'."

33

Because the court erred in refusing, at the request of the defendant properly and in due time made, to submit its requested Special Issue No. 9, reading as follows:

"Has the plaintiff proved by a preponderance of the evidence introduced upon the trial of this cause that the failure, if there was a failure, on the part of its servants in charge of its locomotive to ring the bell thereon, while said locomotive was passing through the defendant's yard at Leesville, Louisiana, caused, or contributed to cause the death of D. R. Ferguson.
Answer 'Yes' or 'No'."

34

Because the court erred in refusing, at the request of the defendant properly and in due time made, to submit its requested Special Issue No. 10, reading as follows:

"Did D. R. Ferguson know the schedule time for the arrival of the train which is alleged to have struck and killed him at Leesville, Louisiana?
[fol. 78] Answer 'Yes' or 'no'."

35

Because the court erred in refusing, at the request of the defendant properly and in due time made, to submit its requested Special Issue No. 12, reading as follows:

"Has the plaintiff proved by a preponderance of the evidence introduced upon the trial of this cause that the speed at which the train was run through the defendant's yard at Leesville on the night that D. R. Ferguson was killed, either caused, or contributed to cause the death of D. R. Ferguson?

Answer 'Yes' or 'No'."

36

Because the court erred in refusing, at the request of the defendant properly and in due time made, to submit its requested Special Issue No. 13, reading as follows:

"What do you find from the evidence was the proximate cause of D. R. Ferguson's death?

37

Because the court erred in requiring the defendant to argue this cause, and in permitting two attorneys for the plaintiff to argue it, after the opening argument had been made for the plaintiff by Leonard Jones, and the defendant had thereupon, in open court, submitted the cause to the jury without argument.

38

Because the court erred in permitting the plaintiff, over the defendant's objections, to prove by his witness, Mrs. Ona Carlisle, that the train alleged to have killed the deceased, Ferguson, in approaching the depot and passing through the yard at Leesville, Louisiana, on the night the [fol. 79] deceased was killed, was running, it seemed to her, considerably faster than other trains usually came in there, and she gussed was running about 15 or 20 miles an hour faster; all of which is shown, together with the objections made thereto, by defendant's Bill of Exceptions No. One.

39

Because the court erred in permitting the plaintiff to prove, over the objection of the defendant, by his witness, Creal Carlisle, that the train which is alleged to have struck and killed the deceased, Ferguson, on the night the deceased was killed, ran into Leesville and through the yards at a speed witness would say anything from 30 to 35 miles an hour, probably more or less. The objections to this testimony are shown by defendant's Bill of Exceptions No. Two, to which reference is here now made.

40

Because S. P. Jones, attorney for the plaintiff, was guilty of gross misconduct prejudicial to the rights of the defendant in making the closing argument in this cause, in that he stated to the jury that when deceased was killed, "that the sleuths and hawkshaws were turned loose on him". This was highly prejudicial to the rights of the defendant, in that H. H. Alexander, defendant's Assistant Claim Agent, testified as a witness in this cause, and other testimony had been introduced showing that statements had been taken after the death of deceased by Special Agents of the defendant, *of the defendant*, but no misconduct on the part of any of such Special Agents had been shown.

41

Because the judgment of the court rendered in this cause is unsupported by any legitimate evidence, and is contrary [fol. 80] to the evidence.

42

Because the amount of the judgment is grossly excessive, and unauthorized by the testimony.

For the foregoing reasons, the defendant respectfully prays that the court set aside the findings of the jury in response to the Special Issues, the judgment of the court rendered thereon, and that a new trial of this cause be granted, and it will ever pray.

King, Mahaffey & Wheeler, Attorneys for Defendant.

[File endorsement omitted.]

In District Court of Bowie County

[Title omitted]

Order Overruling Motion for New Trial

Now on this the 29th day of December A. D. 1924, came on to be heard the First Amended motion of the Defendant to set aside the findings of the jury and the judgment rendered therein and grant it a new trial, on the parties plaintiff and defendant both appearing and announcing ready upon said motion the court proceeded to hear the same, after hearing said motion and being advised as to the law the court is of the opinion that the same is not well taken and should be in all things overruled and refused.

[fol. 81] Therefore it is the order judgment and decree of the Court that said motion be and the same is hereby in all things overruled and refused.

Therefore it is the order judgment and decree of the court that said motion be and the same is hereby in all things overruled and refused to which action on the part of the Court the defendant excepted and then and there in open court gave notice of appeal to the Court of Civil Appeals for the 6th Supreme Judicial District of Texas, at Texarkana, Texas.

It is further ordered and decreed that the defendant be allowed ninety (90) days from this date in which to prepare and file a statement of facts and Bills of Exceptions.

In District Court of Bowie County

[Title omitted]

Motion for Extension of Time—Filed December 15, 1924

To the Hon. Hugh Carney, judge:

Now comes the defendant in the above entitled and numbered cause and prays that the court make and enter an order herein, extending the time within which the defendant shall be allowed to prepare and cause to be approved and filed in this cause a Statement of Facts and Bills of Ex-

ceptions, for ninety (90) days from and after the thirty (30) days provided by law from the date of the judgment in this cause—that is to say, shall so extend the time that the defendant shall be allowed one hundred and twenty [fol. 82] (120) days in all from and after the date of the judgment in this cause within which to prepare and file a statement of Facts and Bills of Exception herein.

The defendant shows it has good cause for making this request, because since the trial of this case the official court reporter of this court has been so busily engaged in the performance of his duties in the trial of causes in this court, and in the preparation of statements of fact in cases recently tried in the District Court of Cass County, and the attorneys for the defendant who tried this cause, have been so busily engaged in the trial of other causes in this court, that it has been a physical impossibility heretofore to prepare a statement of facts or bills of exception in said cause; in view of the great number of statements of fact the official court reporter of this court will be required to prepare in causes tried in this court, it is necessary that the time for filing the Statement of Facts and Bills of Exception in this cause be extended as above requested.

King, Mahaffey & Wheeler, Attys. for Deft.

Duly sworn to by J. Q. Mahaffey. Jurat omitted in printing.

[fol. 83] In District Court of Bowie County

[Title omitted]

Order Extending Time

On this the 15th day of December, A. D. 1924, came on to be heard the request of the defendant in the above entitled and numbered cause, that it be allowed an extension of time of ninety (90) days, in addition to the thirty (30) days' time allowed by law, within which to prepare, cause to be approved and filed a Statement of Facts and Bills of Exception in this cause, and it appearing to the court that good cause exists why such extension of time as prayed for by the defendant be allowed, it is by the court here now ordered

that the defendant in the above styled cause be and it is hereby allowed an extension of time of ninety (90) days from and after the expiration of the thirty (30) days after the date of the judgment in this cause, allowed by law, [fol. 84] within which to prepare, cause to be approved and filed the Statement of Facts and Bills of Exception in this cause—that is to say, that the defendant is allowed one hundred and twenty (120) days from and after the date of the judgment in this cause within which to prepare, cause to be approved and filed a Statement of Facts and Bills of Exception therein, all of which is so ordered.

Hugh Carney, Judge 5th Judicial District of Texas.

In District Court of Bowie County

[Title omitted]

Assignments of Error—Filed February 3, 1925

Now comes the Kansas City Southern Railway Company, defendant in the above styled and numbered cause, and assigns the following errors, which it charges were committed by the District Court of Bowie County, Texas, upon the trial therein of the above styled and numbered cause:

First Assignment of Error (1st in Motion for New Trial)

The court erred in refusing, on motion of the defendant, to set aside the finding of the jury in response to Special Issue No. 1 submitted to it by the court. This was error, because such finding is unsupported by any evidence in [fol. 85] troduced on the trial of this cause, in that no testimony was introduced which would have authorized the jury to find that the failure of defendant's servants to dim the headlight on the engine of the train alleged to have struck and killed the deceased, D. R. Ferguson, was negligence. On the other hand, the evidence showed without dispute that such servants, in failing to dim the headlight, were acting in accordance with the rules and regulations of the defendant about which the deceased well knew; and there was no testimony to show that other railroads pur-

sued any different custom to that pursued by the defendant in similar circumstances; on the other hand, it was shown that reputable railroad companies, in running their passenger trains on main lines into stations and through yards, failed to dim the headlights thereon, and that the custom of keeping such headlights *burning* in such circumstances was deemed the part of wisdom by experienced railroad men.

Second Assignment of Error (2nd in Motion for New Trial)

The court erred in refusing, on motion of the defendant, to set aside the finding of the jury in response to Special Issue No. 2, submitted to it. This was error, because such finding is unsupported by any evidence introduced on the trial of this cause, in that no evidence was introduced from which the jury could find that the failure to dim the headlight on the locomotive alleged to have struck and killed the deceased, D. R. Ferguson, in any way or manner caused him to be blinded thereby, and thereby proximately caused, or contributed to cause his death.

[fol. 86] Third Assignment of Error (3rd in Motion for New Trial)

The court erred in refusing, on motion of the defendant, to set aside the finding of the jury in response to Special Issue No. 3, submitted to it by the court. This was error, because such finding is unsupported by the testimony, or by any testimony introduced on the trial of this cause, in that there was no testimony introduced from which the jury were authorized to find that the train which struck and killed D. R. Ferguson, was, at the time he was struck and killed, being operated through defendant's yard at Leesville, Louisiana, at a dangerous and unusually high rate of speed.

Fourth Assignment of Error (4th in Motion for New Trial)

The court erred in refusing, on motion of the defendant, to set aside the finding of the jury in response to Special Issue No. 4 submitted to it. This was error, because such finding is contrary to and unsupported by any evidence

introduced on the trial of this cause, in that no testimony was introduced from which the jury could rationally find that the rate of speed at which defendant's train that is alleged to have struck and killed the deceased, was, at the time the deceased was killed, being operated at such rate of speed as to constitute negligence.

Fifth Assignment of Error (5th in Motion for New Trial)

The court erred in refusing, on motion of the defendant, to set aside the finding of the jury in response to Special issue No. 5 submitted to it. This was error, because no testimony was introduced at the trial from which the jury could rationally have found, or were authorized to have found, that the speed at which the train was operated at [fol. 87] the time deceased was struck and killed, was in truth or fact a proximate cause of the death of the deceased, D. R. Ferguson.

Sixth Assignment of Error (6th in Motion for New Trial)

The court erred in refusing, on motion of the defendant to set aside the finding of the jury in response to Special Issue No. 6 submitted to it. This was error, because such finding is contrary to the evidence, and is unsupported by the evidence, in that the great preponderance of the disinterested testimony introduced upon the trial of this cause showed that there was no failure on the part of the agents and servants of defendant in charge of the engine of the train, which is supposed to have struck and killed D. R. Ferguson, to ring the bell of said engine as said train approached the place where the said D. R. Ferguson was struck.

Seventh Assignment of Error (7th in Motion for New Trial)

The court erred in refusing, on motion of the defendant, to set aside the finding of the jury in response to Special Issue No. 7 submitted to it. This was error, because such finding is contrary to the evidence, and is unsupported by the evidence, in that no evidence was introduced upon the trial from which the jury would be authorized to find that

the failure to ring the bell to the engine when it approached the place where deceased is supposed to have been struck and killed, was in truth or fact negligence, insofar as the rights of the deceased were concerned.

Eighth Assignment of Error (8th in Motion for New Trial)

The court erred in refusing, on motion of the defendant, to set aside the finding of the jury in response to Special Issue No. 8 submitted to it. This was error, because such [fol. 88] finding is unsupported by any evidence introduced on the trial of the cause, in that no evidence was introduced at the time showing or tending to show that failure to ring the bell on the engine, if in fact there was a failure so to do, was a proximate cause of the death of the deceased, D. R. Ferguson.

Ninth Assignment of Error (9th in Motion for New Trial)

The court erred in refusing, on motion of the defendant, to set aside the finding of the jury in response to Special Issue No. 9 submitted to it. This was error, because such finding is contrary to the overwhelming weight and preponderance of the testimony, in that the overwhelming weight and preponderance of the disinterested testimony introduced on the trial of this cause, proved that there was no failure on the part of the defendant's agents and servants in charge of the engine of the train which struck D. R. Ferguson, deceased, to sound the whistle of said engine as said train approached the yards wherein the said D. R. Ferguson was working. On the other hand, the overwhelming weight of the disinterested testimony was to the effect that such whistle was sounded as such train approached the yards wherein the said D. R. Ferguson was working.

Tenth Assignment of Error (10th in Motion for New Trial)

The court erred in refusing, on motion of the defendant, to set aside the finding of the jury in response to Special Issue No. 10 submitted to it. This was error, because such finding is contrary to and unsupported by the evidence, in that no evidence was introduced on the trial from which the jury were authorized to find that a failure to sound the

whistle of said engine, if in fact there was a failure so to do, constituted negligence, insofar as the rights of the de-
[fol. 89] ceased were concerned.

Eleventh Assignment of Error (11th in Motion for New Trial)

The court erred in refusing, on motion of the defendant, to set aside the finding of the jury in response to Special Issue No. 11 submitted to it. This was error, because such finding is contrary to the evidence, and is unsupported by the evidence, for the reason that no testimony was introduced upon the trial of this cause from which the jury were authorized to find that the failure to sound the whistle of the engine, if there was a failure so to do, was a proximate cause of the death of the deceased, D. R. Ferguson.

Twelfth Assignment of Error (12th in Motion for New Trial)

The court erred in refusing, on motion of the defendant, to set aside the finding of the jury in response to Special Issue No. 12, submitted to it. This was error, because such finding is contrary to the undisputed evidence adduced upon the trial of this cause, which was in substance and to the effect that the deceased had long been a car inspector in defendant's yard at Leesville, Louisiana; was well acquainted with the location of its tracks, and with the schedule time for the arrival of the train which is alleged to have struck and killed him, and that such train was on time on the night he is alleged to have been struck and killed thereby; that he was well acquainted with the location of the track upon which such train would run when it came into the yard, and was under the duty, in his employment, to look out for and avoid injury from such train.

[fol. 90] Thirteenth Assignment of Error (13th in Motion for a New Trial)

The court erred in refusing, on motion of the defendant, to set aside the finding of the jury in response to Special Issue No. 13, to the effect that the plaintiff should recover $13,000.00 as damages. This was error, because such

amount of damages so found by the jury is unsupported by the testimony, and is grossly excessive, even if it is admitted that the plaintiff was entitled to recover.

Fourteenth Assignment of Error (14th in Motion for New Trial)

The court erred in refusing, on motion of the defendant, to set aside the finding of the jury in response to Special Issue No. 14 submitted to it. This was error, because such finding is contrary to the great weight and preponderance of the evidence, in that the overwhelming weight of the undisputed evidence on the trial showed that the deceased was, at the time he was struck and killed, intoxicated; and that such intoxication had resulted from the recent immoderate use of liquor.

Fifteenth Assignment of Error (15th in Motion for New Trial)

The court erred in refusing, on motion of the defendant, to set aside the finding of the jury in response to Special Issue No. 15, submitted to it. This was error, because such finding is unsupported by the evidence, and is contrary to any rational hypothesis which can be formulated, in view of the undisputed facts relating to or accounting for the death of the deceased, D. R. Ferguson.

Sixteenth Assignment of Error (16th in Motion for New Trial)

The court erred in submitting to the jury Special Issue No. 1, reading as follows:

[fol. 91] "Do you believe from the evidence that the failure of defendant's servants or agents in charge of the operation of the passenger train which struck and killed D. R. Ferguson in the yards at Leesville, Louisiana, on or about February 12th, 1922, to dim the headlight of the engine of said train, as the said train approached the place where the said D. R. Ferguson was struck, was negligence on the part of said servants or agents in charge of said train?

Answer Yes or No."

This was error, because: (1) There is no evidence in the record from which the jury could reasonably find that the failure to dim the headlight on the engine pulling the defendant's passenger train on February 12th, 1922, was a proximate or contributing cause of or to the death of D. R. Ferguson, the deceased; (2) Because the testimony shows that the Engineer in charge of such engine, in failing to dim the headlight of the engine in entering and passing through the yards at Leesville, was acting in accordance with the custom and regulations of defendant in the operation of its railroad, and there was no testimony introduced to show that it was dangerous to run said engine into and through said yard without dimming the headlight; and (3) because negligence cannot be predicated upon the observance of a custom of usage of the defendant as to the manner of conducting its business, unless it be shown that such method or manner employed was one not usually or customarily pursued by railroad, and it would be an invasion of defendant's rights to conduct its business as in its judgment would best promote the same, to submit to the jury the issue of negligence as to such method.

[fol. 92] Seventeenth Assignment of Error (17th in Motion for New Trial)

The court erred in submitting to the jury Special Issue or question No. 2, reading as follows:

"Do you believe from the evidence that the failure to dim the headlight of said engine at said time and place caused the said D. R. Ferguson to be blinded and thereby was a proximate cause of the death of the said D. R. Ferguson?

Answer Yes or No."

It was error for the court to submit to the jury this issue or question, because no evidence was introduced on the trial of this cause from which the jury could reasonably find that the failure to dim the headlight of the engine at the time and place D. R. Ferguson was killed, caused the said D. R. Ferguson to be blinded, or that the failure to dim said headlight was the proximate cause of the death of said D. R. Ferguson. No evidence was introduced proving, or

tending to prove that D. R. Ferguson was blinded by such headlight or that the failure to dim said headlight in any sense caused or contributed to cause him to be struck or injured by said train.

Eighteenth Assignment of Error (18th in Motion for New Trial)

The court erred in submitting to the jury Special Issue or Question No. 3, in the form in which it was framed, reading as follows:

"Do you believe from the evidence that the train which struck the said D. R. Ferguson, at the time it approached the place in the yard at Leesville where the said D. R. Ferguson was struck, was being operated at a dangerously and unusually high rate of speed?
[fol. 93] Answer Yes or No."

This was error, because no testimony was introduced on the trial from which the jury could reasonably find that the train alleged to have struck and killed D. R. Ferguson, was being operated at a dangerous rate of speed; and further, because no evidence was introduced from which the jury could find that the speed at which said train was operated through the yards of defendant at Leesville on the night D. R. Ferguson was killed, either caused or contributed to cause his death.

Nineteenth Assignment of Error (19th in Motion for New Trial)

The court erred in submitting to the jury Special Issue or Question No. 4, reading as follows:

"If you answer No. 3 'No,' you need not answer this issue. If you answer No. 3, 'Yes', then was such rate of speed of operation of said train at said time and place negligence, as that term has hereinbefore been defined to you?

Answer Yes or No".

This was error, because no evidence was introduced on the trial of this cause to show that the rate of speed at

which the train was operated was a dangerous one; and further, because no testimony was introduced on the trial from which the jury could reasonably find that the rate of speed at which the train was operated through the yard at Leesville on the night that D. R. Ferguson was killed, was negligence.

Twentieth Assignment of Error (20th in Motion for New Trial)

The court erred in submitting to the jury Special Issue or Question No. 5, reading as follows:

[fol. 94] "If you answer No. 3 or No. 4 'No', then you need not answer this issue. If you answer both No. 3 and No. 4, 'Yes', then was such rate of speed of operation of said train a proximate cause of the death of the said D. R. Ferguson, as that term 'Proximate cause' has hereinbefore been defined to you*f*?

Answer Yes or No".

This was error, because there was introduced on the trial of this cause no evidence from which the jury could reasonably find that the speed at which the train was operated through its yard at Leesville on the night D. R. Ferguson was killed, was either a proximate or remote cause of the death of D. R. Ferguson.

Twenty-first Assignment of Error (21st in Motion for New Trial)

The court erred in submitting to the jury Special Issue or Question No. 6, reading as follows:

"Do you believe from the evidence that the servants or agents of defendant in charge of the engine of said train which struck the said D. R. Ferguson, on or about the aforesaid time and place, failed to ring the bell of said engine, as said train approached the place where the said D. R. Ferguson was struck?

Answer Yes or No".

This was error, because no evidence was introduced on the trial from which the jury could reasonably find that a failure to ring the bell on the engine when it was passing through the yard at Leesville on the night D. R. Ferguson

was killed, was a proximate cause of or contributing cause to the death of D. R. Ferguson, deceased; and further, because no evidence was introduced to prove that D. R. Ferguson did not know of the approach of such train in time to avoid being injured thereby.

[fol. 95] Twenty-second Assignment of Error (22nd in Motion for New Trial)

The court erred in submitting to the jury Special Issue or Question No. 7, reading as follows:

"If you answer No. 6 'No', then you need not answer this issue. If you answer No. 6 'Yes', then was the failure to ring the bell of said engine, at said time and place, negligence, as that term is hereinbefore defined to you?

Answer Yes or No".

This was error, because no evidence was introduced at the trial from which the jury could reasonably find that the failure, if failure there was, to ring the bell of said engine, caused or contributed to cause the death of said D. R. Ferguson; and the question of the failure or not to ring the bell was an immaterial question.

Twenty-third Assignment of Error (23rd in Motion for New Trial)

The court erred in submitting to the jury Special Issue or Question No. 8, reading as follows:

"If you answer No. 6 or No. 7 'No', then you need not answer this issue. If you answer No. 6 and No. 7 'Yes', then was such failure to ring the bell of said engine, at said time and place, a proximate cause of the death of the said D. R. Ferguson, as that term—proximate cause—has hereinbefore been defined to you?

Answer Yes or No".

This was error, because there was introduced on the trial of the cause no testimony from which the jury could find the failure, if failure there was, to ring the bell of the engine when the same was passing through the yards of defendant at Leesville on the night that D. R. Ferguson [fol. 96] was killed, was either a proximate or contributing cause of the death of D. R. Ferguson.

Twenty-fourth Assignment of Error (24th in Motion for New Trial)

The court erred in submitting to the jury Special Issue or Question No. 9, reading as follows:

"Do you believe from the evidence that the servants or agents of the defendant in charge of the engine of said train which struck the said D. R. Ferguson, on or about the time and place aforesaid, failed to sound the whistle of said engine, as said train approached the yards wherein the said D. R. Ferguson was working?

Answer Yes or No."

This was error, because on the trial of this cause, no evidence was introduced to show that the failure, if any, to sound the whistle of the engine, was a proximate cause of the death of D. R. Ferguson, deceased.

Twenty-fifth Assignment of Error (25th in Motion for New Trial)

The court erred in submitting to the jury Special Issue or Question No. 10, reading as follows:

"If you answer No. 9 'No,' then you need not answer this issue. If you answer No. 9 'Yes,' then was the failure to sound the whistle of said engine negligence, as that term is hereinbefore defined to you?

Answer Yes or No."

This was error, because no testimony was introduced on the trial of this cause from which the jury could reasonably find that the failure, if any, to sound the whistle of the engine was a proximate or contributing cause of the death of D. R. Ferguson, and, therefore, the question as to whether the failure to sound the whistle is an immaterial issue in this cause.

[fol. 97] Twenty-sixth Assignment of Error (26th in Motion for New Trial)

The court erred in submitting to the jury Special Issue or Question No. 11, reading as follows:

"If you answer No. 9 or No. 10 'No,' then you need not answer this issue. If you answer No. 9 and No. 10 'Yes,'

then was the failure to sound the whistle of said engine a proximate cause of the death of the said D. R. Ferguson, as that term—proximate cause—is hereinbefore defined to you?

Answer Yes or No."

This was error, because there was no evidence introduced upon the trial of this cause from which the jury could reasonably find that the failure to sound the whistle of the engine was a proximate cause of the death of D. R. Ferguson, deceased.

Twenty-seventh Assignment of Error (27th in Motion for New Trial)

The court erred, in the submission of Issues 1 to 11 inclusive, in failing, in connection with each of said issues, to clearly indicate with respect to each, upon which of the parties the burden of proof rested; and further erred in framing such issues, in that they were framed in such a way as to lead the jury to believe that they should each be answered in the affirmative.

Twenty-eighth Assignment of Error (28th in Motion for New Trial)

The court erred in failing and refusing, at the conclusion of the evidence offered by plaintiff, to sustain the motion interposed by the defendant for the court to instruct the jury to return a verdict in its favor.

[fol. 98] Twenty-ninth Assignment of Error (29th in Motion for New Trial)

The court erred, at the conclusion of all the evidence, in refusing, at the request of the defendant, preemptorily to instruct the jury to return a verdict in favor of the defendant.

Thirtieth Assignment of Error (30th in Motion for New Trial)

The court erred in refusing, at the request of the defendant, properly and in due time made, to submit its requested Special Issue No. 6, reading as follows:

"Has the plaintiff proved by a preponderance of the evidence introduced on the trial of this cause, that D. R. Ferguson was caused to be killed by reason of the failure of the defendant to dim the lights on its locomotive which is alleged to have struck and killed him?

Answer yes or no."

Thirty-first Assignment of Error (31st in Motion for New Trial)

The court erred in refusing, at the request of the defendant, properly and in due time made, to submit its requested Special Issue No. 7, reading as follows:

"Has the plaintiff proved by a preponderance of the evidence introduced on the trail of this cause that the failure of the defendant to dim the lights on its locomotive either caused, or contributed to cause the death of D. R. Ferguson?

Answer Yes or No."

Thirty-second Assignment of Error (32nd in Motion for New Trial)

The court erred in refusing, at the request of the defendant, properly and in due time made, to submit its requested [fol. 99] Special Issue No. 8, reading as follows:

"Has the plaintiff proved by a preponderance of the evidence introduced on the trial of this cause that the failure, if there was a failure, on the part of its agents and servants in charge of its locomotive to sound the whistle thereof in approaching its station at Leesville, Louisiana, either caused, or contributed to cause the death of D. R. Ferguson?

Answer Yes or No."

Thirty-third Assignment of Error

The court erred in refusing, at the request of the defendant, properly and in due time made, to submit its requested Special Issue No. 9, reading as follows:

"Has the plaintiff proved by a preponderance of the evidence introduced upon the trial of this cause that the failure, if there was a failure, on the part of its servants in charge of its locomotive to ring the bell thereon, while said locomo-

tive was passing through the defendant's yard at Leesville, Louisiana, caused, or contributed to cause the death of D. R. Ferguson?

Answer Yes or No."

Thirty-fourth Assignment of Error (34th in Motion for New Trial)

The court erred in refusing, at the request of the defendant, properly and in due time made, to submit its requested Special Issue No. 10, reading as follows:

"Did D. R. Ferguson know the schedule time for the arrival of the train which is alleged to have struck and killed him at Leesville, Louisiana?

Answer Yes or No."

Thirty-fifth Assignment of Error (35th in Motion for New Trial)

The court erred in refusing, at the request of the defendant, properly and in due time made, to submit its re-[fol. 100] quested Special Issue No. 12, reading as follows:

"Has the plaintiff proved by a preponderance of the evidence introduced upon the trial of this cause that the speed at which the train was run through the defendant's yard at Leesville on the night that D. R. Ferguson was killed, either caused, or contributed to cause the death of D. R. Ferguson?

Thirty-sixth Assignment of Error (36th in Motion for New Trial)

The court erred in refusing, at the request of the defendant, properly and in due time made, to submit its requested Special Issue No. 13, reading as follows:

"What do you find from the evidence was the proximate cause of D. R. Ferguson's death?

Thirty-Seventh Assignment of Error (37th in Motion for New Trial)

The court erred in requiring the defendant to argue this cause, and in permitting two attorneys for the plaintiff to argue it, after the opening argument had been made for the

plaintiff by Leonard Jones, and the defendant had thereupon, in open court, submitted the cause to the jury without argument.

Thirty-eighth Assignment of Error (38th in Motion for New Trial

The court erred in permitting the plaintiff, over the defendant's objections, to prove by his witness, Mrs. Ona Carlisle, that the train alleged to have killed the deceased Ferguson, in approaching the depot and passing through the yard at Leesville, Louisiana, on the night the deceased was killed, was running, it seemed to her, considerably faster than other trains usually came in there, and she [fol. 101] guessed was running about 15 or 20 miles an hour faster; all of which *si* shown, together with the objections made thereto, by defendant's Bill of Exceptions No. 1.

Thirty-ninth Assignment of Error ((39th in Motion for New Trial)

The court erred in permitting the plaintiff to prove, over the objection of the defendant, by his witness, Creal Carlisle, that the train which is alleged to have struck and killed the deceased, Ferguson, on the night the deceased was killed, ran into Leesville and through the yards at a speed witness would say anything from 30 to 35 miles an hour, probably more or less. The objections to this testimony are shown by defendant's Bill of Exceptions No. 2, to which reference is here now made.

Fortieth Assignment of Error

The court erred in refusing to grant a new trial of this cause, for the reason that the judgment rendered is unsupported by any legitimate evidence, and is contrary to the evidence.

Forty-first Assignment of Error

The court erred in refusing to grant a new trial of this cause, because the judgment is grossly excessive, and is unauthorized by the evidence.

King, Mahaffey & Wheeler, Attorneys for Defendant.

[File endorsement omitted.]

[fols. 102 & 103] Bond on appeal for $27,000, approved and filed January 9, 1925, omitted in printing.

[fol. 104] Cost bill omitted in printing.

[fols. 105 & 106] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 107] In District Court of Bowie County

[Title omitted]

Tried November 17th, 1924

Appearances: Jones, Sexton & Jones, and Keeny & Dalby, Attorneys for the Plaintiff; King, Mahaffey & Wheeler, Attorneys for the Defendant.

Statement of Facts—Filed in District Court March 25, 1925; in Court of Appeals November 30, 1925; in Supreme Court December 8, 1926

Caption

Be it Remembered, That upon the trial of the above entitled and numbered cause, the following are the facts, and all the facts adduced upon the trial of said cause:

[fol. 108] Mrs. Ona Carlisle, a witness for the plaintiff, after being duly sworn, testified as follows:

Direct examination:

My name is Ona Carlisle; my maiden name was Miss Ona Ferguson. My father's name was D. R. Ferguson. I now live at Port Arthur, Texas. My husband's name is Carlisle; I have been married since August 11th, 1923. My father's name was D. R. Ferguson; he is dead. He died on February 12th, 1922. My father lived at Leesville, Louisiana at the time of his death; I think we had lived at Leesville about ten years when he was killed—not quite ten

years, we moved there in 1913. My mother was dead; she died in July, 1921. At the time of my father's death he had five children; I was the oldest, I was twenty-three years old at the time of his death; the next one, my oldest brother, K. D. was twenty then; and the next one was Jewel, she was eighteen; and the next one was Rupert, he was thirteen; and the next one Otis, he was eight; that constituted the family; all of them lived at home. I kept house for my father and took care of the other children while my father was working. My father's occupation at the time of his death was car inspector for the Kansas City Southern; he was car inspector there at Leesville, where he had been for several years, five I think. He was car repairer before he was car inspector; he first worked as car repairer, then after we moved to Leesville he was made car inspector. The railroad company had a yard there at Leesville; there were several tracks there, seven or eight [fol. 109] I think; they have a round house there; the general direction of the railroad there is North and South; yes, Port Arthur was South and Shreveport and Texarkana was North. That railroad is the Kansas City Southern. I lived on the main line of the railroad, a little over half a block. I lived on the west side of the railroad; I lived south of the passenger depot, and on the west side of the road; we did not rent there, my father owned the place; daddy owned the place. I lived south of the depot four or five blocks, I imagine; I mean the ordinary city block of about two hundred and forty feet; if I were to travel east from my house till I come to the railroad I would come first to track No. 1, that is the main line of the track from Port Arthur to Kansas City, and then the next track No. 2, some called it the second track; some called it the passing track, but father always called it track No. 2, and then beyond that were several tracks; I think there were five on the other side of track No. 2. Well, the yards at Leesville extend almost to Staples, it must have been three quarters of a mile; yes, my father was car inspector at Leesville; by car inspector I mean that he inspected the trains that came in there and went out, he did have to inspect passenger trains unless he had a freight; if he had a freight train he didn't have to go to the depot to inspect a passenger train; primarily it was the freight trains; if there was any-

thing to do on the passenger usually his boss telegraphed ahead and told him to meet the train; he was usually up there if he didn't have any work to do. My father worked from two in the afternoon until ten o'clock at night. On [fol. 110] the day of my father's death it was a little after six o'clock the last time I saw him alive; it was in the evening. I saw him at the house. He was in the habit of coming to the house in the afternoon or night, he always came to get coffee and to eat supper. It was on Sunday my father died; I saw him about six o'clock or a little after six. He didn't eat supper at the house that night, he just drank coffee; I gave him the coffee. My little brother and Mr. Carlisle were there at the time. Mr. Carlisle is now my husband; we were not married then. He was a young man there at Leesville at the time. Mr. Carlisle and my brother Rupert drank coffee with my father that night. After he drank the coffee he went back to work; when he went to the house he came from the tracks, and after he drank the coffee he went back in the same direction, right at the same side of the house and out; yes sir, I expected him back later for his supper, he told me he would. At the time he left the house I heard an engine at work in the yard, a railroad engine. I had lived there a long while; my father was inspector; I had noticed the general movement of making up trains; I knew that they were made up by the engine shoving and moving cars. I heard the engine making up a train, or a noise of that kind; yes, sir, sure it made a noise; I think I know how they kick up these cars; I know they shove them in and hit the other cars; this makes lots of noise; can be heard over to our house and further than that. The engine making up the train makes noise; no sir, my father didn't come back to supper that night; no sir, I never saw him alive any more. After father had gone over there another train came into the yard at Leesville. The Lake Charles and Shreveport train, formerly called the Plug, came in there, it was a passenger train and it came from the South, going north. It passed our place before it came to the depot. From my home the [fol. 111] train was visible almost to Staples and the track is clear and straight almost to Staples; when the train came I was standing on the back porch. As to the direction the track was, well, there was three bed rooms on the west

and then on the east side was the kitchen, and the back porch was a little hall-way and faced west in a way and the kitchen was east of that. You could see to the west, there wasn't anything west of the back porch, and towards the south, it was open that way, but to the east the kitchen blocked the vision. I didn't know whether it was a passenger or freight train but I thought it was a freight train. I discussed the train with Mr. Carlisle, and as to whether or not it was a passenger train, I thought it was a freight train and he thought it was a passenger. I remained on the porch until the train got to the station and it passed within half a block of me then. The whistle was not blown after the train left Staples; I was standing there looking at it. The bell was not ringing and the whistle was not blowing before it left my house nor after it passed my house and it didn't ring and no whistles were blown until after it stopped. I have ridden in automobiles and on trains and have observed the speedometer on automobiles. That was not the first time I had ever seen a passenger train come in there, I was close to the track and seen them lots and lots. As to the speed of this train compar*e*red with the speed of other passenger trains that usually come in there it was faster, seemed to me that it was considerably faster than usual; I guess it was about fifteen or twenty miles per hour faster. I didn't go down to the yards that night, Dr. Jones and my brother told me not to go down there, I never did go down there until after he was buried, I went to look at the place. The [fol. 112] place where my father's body was found was nearly even or a little bit south of the house, and it was between as I call them tracks Nos. 1 and 2; that is what some of them call the main line and the passing track. There was four or five feet between these two tracks, I imagine; we have have noticed it several times since then and it seems to be about four or five feet; of course, I never measured it, between the end- of the ties. Say that this table represented the general lay of the ground, and my home is where I am, then comes the main line, then over east of that the passing track, or one and two. As to the ground being level between the tracks, all tracks I ever saw was low and then slanted up, well, this one was that way; it was lower between the tracks than it was upon either of the tracks. I said my mother had been dead since July, 1921.

My father and the children and me lived in the same house for a while and then he bought this place; we lived together. My father made around $150.00 per month, may be more; I know that because he always brought his check home and we knew about what he made; as a rule I cashed his check. We ran accounts; I paid the bills and if there was any money left we spent it around the house there and for our own amusement; my father was very economical in his habits. The two smallest boys went to school, my sister was at that time about eighteen years old, she has since married. She married in September, 1922. I have forgotten the date. We all went to Sunday school and Church. My father always sent them to Church and Sunday School. My father talked with the children about their lives and how they should live, their conduct and who they should associate with and so on, he always talked to us about the company we kept and things like that, and what he intended [fol. 113] to make out of his children. The general line of his conversation was that he always told us to keep the best company or none at all and to do the very best that we could so that people would respect us and we would have the very best of friends. My father was very affectionate towards the children. The two small children live with me, the two boys. The little fellow there, the smallest one is the baby. As the train came in the headlight was shining and pointing towards us from the yard limits below or about the city limits down there in the lower part of the yard; we can see the city limit post from our house. I didn't observe any change in the headlight from the time it reached there up until it passed my house, it was the same. Mr. Carlisle was on the porch with me, and my brother Rupert was in the kitchen, I think, or he might have been standing on the porch there. Rupert is not in good health now, he has had tuberculosis.

Cross-examination:

I testified in this case before as Miss Ona Ferguson. Mr. Creal Carlisle was up here also and testified as a witness, he is here now. He was at my house that afternoon but he wasn't there all the afternoon, he came right after four o'clock, or around four o'clock sometime, I suppose it was after four when he came. Our house faced the west and on

the front or west side there were three rooms and a hall, we called it a porch but it was what you would call a hall, it wasn't but about six feet across and the kitchen was on the east side of the bedrooms and the porch was in between; [fol. 114] there was three rooms on the west side and then the kitchen; it was what you would call a shot-gun house, three rooms, each in a row and then there was a little porch in between those and the kitchen, daddy formerly built it for a porch, and then he built a kitchen on east of that; this is the west side of the house, something like that, and then the three rooms and porch in here and then the kitchen is back in here. I can give you a rough drawing of that. There was three rooms, all about the same size and then a little porch that didn't extend out as far as those rooms, out about like that, and then here was the kitchen down here, out here it was bigger than the porch you see, the kitchen was about fourteen by fourteen and that was intended for the porch. This is the kitchen, and this is the west, this is east and that is north and south. As to where we were standing, now, there was the walk that went out this way that daddy always went out and I was standing right about there. M*y*. Carlisle was standing there by me leaning up against the flower shelf. Between my house and the railroad the Standard Oil Company has a station there on two blocks, and they have three little houses out there on their place and in the two front corners—in the southeast corner they have the office building, a small office building, and then on the northeast corner they have a little platform where they have their pumps and two big tanks to fill the oil out for the trucks and then in the back next to my kitchen they have the garage where they keep their cars, that was between my house and the railroad right-of-way. I heard this train at Staples, I didn't hear it blow there, just heard it pull out and it didn't blow there, if it had I would have noticed it. We never could hear any of them coming into Staples on account of the [fol. 115] curve below Staples, my father said that was the reason. This particular night I didn't hear it come into Staples and I never heard it whistle for Staples, but I heard it start out of Staples and we could hear it all the way up to Leesville. We could hear the roar of the train and the noise it made and we watched it. The reason we

were watching it is we were just standing there. There wasn't anything unusual for me to see trains coming into Leesville as a good many trains come in there every day and every night. It was dark that night and we could see the train coming almost all the way from Staples, but not all the way. There is a perfectly straight track between Leesville and Staples. I don't know whether it was up-grade or not, I thought it was level, it seems to be perfectly level and a perfectly straight track. That train was on time and due there at 7:05 at that time, that train had been running in there some time, I think it had been taken off once and just put back on a few weeks before that; before that, it had been running in there a good long time at the same time, and my father knew when it was due there. My father had been working there in the yard at Leesville a good long while; he had been car inspector there in the yards and his duty when he didn't have anything else to do was to inspect this identical train. It usually blew when it came into Leesville, had a certain place to blow and it usually rang the bell, that was its custom to blow the whistle and ring the bell as it came into the yard; it didn't do that that night, and that is how I came to be watching the train; I noticed it because I was looking for my father and I watched it after I saw it. I didn't watch every train, but I was watching that one because I was watching for my father to come home, and [fol. 116] when I saw that I says, "Daddy won't come home until late"; when I first heard it I thought it was a freight train, but when I saw it I saw it was a passenger. I saw it was a passenger train long before it came into the yard. The reason I kept watching it was just to be looking, and I knew it didn't ring the bell and blow the whistle, and I never knew it to do that before. I never noticed it every time I had seen it before if it did that, it couldn't have done that and I not noticed it, but it usually blew down there coming into the city limits. I was twenty-three years old then and I am twenty-five now. I was twenty-three at the time my father was killed and my sister was eighteen. She married before the other trial of this case, she married in September after my father was killed in February. My brother's name is K. D., he was twenty years old when my father died, he was twenty-one years old in October, 1921,

and he is twenty-three years old now. Rupert is fifteen years old now, his birthday is in April and I have forgotten the year he was born. Jewel is between my brother K. D. and Rupert, nobody else. I think there are three years between K. D. and Jewel, she was twenty this past October; and I think there are about five years between Jewel and Rupert, I am sure of that because she was a great big girl when Rupert was a baby. I can't tell the year he was born but I can tell the day of the month. I do not have the birth certificates, I could tell you if I had known you were going to be so positive about that; I could have brought the birth certificates with me. My father was sixty-two years old. Besides Mr. Carlisle Mrs. Grogman had been to my house that afternoon, and no other man besides daddy and the family had been there. Mr. Hicks [fol. 117] is the Clerk of the Court at Leesville; he had not been to my house that afternoon, I think he was there Saturday before that, but he wasn't there that Sunday afternoon. I know Mr. Peace, the merchant, but he wasn't there. I know Mr. Oakes, the Justice of the Peace down there, and he was there in the morning, I think but not in the afternoon; he often came by and talked to daddy; I know he wasn't there that afternoon, he might have been there that morning. He might have talked to him there that afternoon, but not in the yard there. I know the Clerk of the Court wasn't there.

Redirect examination:

Rupert has been sick since June. At the time of my father's death I did not do any work other than keep the house for him.

Creal Carlisle, a witness for the plaintiff, after being duly sworn, testified as follows:

Direct examination:

My name is Creal Carlisle. I live at Port Arthur, and have been living there most two years. I am the husband of Mrs. Ona Carlisle, formerly Miss Ona Ferguson. I knew her father during his lifetime; I know that he is dead,

I married Miss Ferguson after her father's death; I married in August of last year, 1923. I remember the cir-
[fol. 118] cumstance of Mr. Ferguson being killed in the yards there at Leesville on the 12th day of February, on Sunday night; I was at his house the latter part of that afternoon, about four o'clock; I went to his house about four or four-thirty and I remained at his house until after I heard of his death. I saw Mr. Ferguson during the time I was there at his house, I saw him when he came to the house around six o'clock; he came from the street running east and west into his back yard, in the back way; the street runs east and west, and other one north and south, and he came in from the street running east and west, and he remained at his house probably fifteen or thirty minutes, he came to supper, I understood, and supper wasn't quite ready, and me and him drank some coffee and he went back after he drank the coffee, and said he was going back to finish making up an extra, and he left and went back out to the street what leads east and west, and towards the railroad. He had a lantern with him at the time he left and it was lighted. After he went away from the house I heard an engine in the yard at Leesville. I have been around where they make up trains and break up trains and shove cars, some, and I heard an engine over there shoving and switching cars, and during the time that was going on another train came into Leesville from the south, running north, a passenger train known as the "Plug," or "Dude," that ran from Lake Charles up to Shreveport; that train was approaching the lower part of the yards when I first saw it. I first seen the glare of the headlight on that train, and afterwards saw the headlight, and the train ran on into the station at Leesville. That was a very bright headlight. I have seen locomotives operated on the roads, and this headlight compared the same with these road head-
[fol. 119] lights, it was not changed during the time it was coming in and going up to the station; the bell was not ringing as it passed through the yards and up to Leesville, and the whistle was not blown at any time as it came into the yard, or after it came into the yard. I noticed the speed at which that train was moving that night, and it was running very fast. I have ridden on trains and I have

been working where they would come by every day, and I have seen them run *run* by—I was engaged in road work, building dirt roads that carried me along side of railroads, and many trains ran on them; I have ridden on passenger trains a right smart, and I have driven automobiles with the speedometer on them. With the experience and observation I have had, I would say that train was running anywhere from thirty to thirty-five miles an hour, probably, more or less, as it went into Leesville, that is my estimate of it. I had seen other passenger trains on other occasions come into Leesville from the South, many of them, lots of times, and this train come into the station from the south much faster than those other passenger trains that come into that station that I had noticed, I would say ten or fifteen miles faster than the usual speed, ten or fifteen miles per hour faster. The train had just been in a few minutes before I heard of Mr. Ferguson's death. I did not go down to the place where his body was, but I did go down there several days later, and saw the place where his body was found, and in going to that place from where Mr. Ferguson's house was the first track I crossed or come to was what I call the "main line track," and then the next one was what they call, "the switch track, or side track"—I come to the first track, the main line, and then the next one just beyond that I noticed the distance between those [fol. 120] two tracks, and it looked like they must be about six feet, probably less, or probably a little more, between the rails, a short space between them; my estimate is that from rail to rail is six feet—from the switch rail to the main line rail. I had been down in that country from October, I believe, and previous to that time I had been in Caddo Parish working for the Enlow Construction Company as Road Foreman, I had been there with them from October up to date. I was raised in Mississippi. I am twenty-six years old.

Cross-examination:

I did not go down to where the body was that night, but I heard very soon after the accident that Mr. Ferguson was dead. I was a friend of the family, and afterwards married into the family. I had been there at the house since right around four o'clock in the afternoon, and while

I was there her (Ona's) sister came in, and I believe her other brother came in, he had been off playing and I believe he came in, but I believe that is all. I know Mr. Hicks, the Circuit Clerk of the Court, but I did not see him there before Mr. Ferguson's death, several came in after his death, but there didn't anybody come there from the time I got there and drank the coffee—between the time I got there until he came and drank the coffee, no more than the one I have mentioned, I don't remember seeing anyone else. I was in the kitchen some of the time, but I wasn't there helping cook supper; this young lady was in the kitchen preparing supper, and I was in the kitchen; I will say she must have been in the kitchen an hour, or something like that, and she had been in there [fol. 121] about thirty minutes before Mr. Ferguson came back for the coffee, and I had been in there all that time, but I was not helping; when Mr. Ferguson came back I drank coffee with him. I don't remember where I was when this train got to Staples. I saw it right after it left Staples, but I did not hear it blow for Staples, I was not watching for it, not then; I first commenced watching for the train when it appeared in sight in the lower part of the yard, I could hear the rumbling of the train, and the nearer it got it made a great deal of noise, I could hear the sound of the engine, but I don't know whether it was the exhaust of the engine or not, I could hear the noise, the racket coming in. With reference to where that other engine was that I am talking about, I could hear switch engines over there south of the depot and below the depot, you could hear them over there, but I don't know that I could hear it right then, when the other one was coming in or not; I heard it south of the depot, probably three or four blocks, and east of the house. I know where the scales are, they are south of the depot—I won't swear that they are, but I think they are, I haven't paid much attention to the scales; they can't hardly be east or west of the depot, because no railroad runs east and west of the depot—I can't say exactly where the scales are. I was watching this train come in, and it did not blow for the station; I was not watching to hear it blow. You can hear these other trains that come in there blow, and these other trains that I watched and compared the speed with this train blew as they came in, I have heard them blow and they

make a practice of blowing and ringing the bell. I had seen this train come in before, but it did not ring the bell when it came in this time; I had seen it come in lots of times and [fol. 122] it would ring the bell when it came in, it made a practice of ringing the bell before then, what I had noticed of it, and I had watched it from this same place and other places, too; it was running much faster than it usually runs, ten or fifteen miles an hour faster, in my estimation, probably a little less or probably a little more, I was just estimating it at something like that. I never ran a train a bit in my life, and never worked on a train.

Q. But you qualify as an expert merely from riding on trains and working along tracks and seeing them pass by, is that the way you qualify as a speed expert?

A. I didn't qualify as a speed expert, I was just estimating it.

Q. Well, as an estimator of speed, is that the way you get it?

A. Yes, sir. I live at Port Arthur, and am a blacksmith there now.

A. Nelson, a witness for the plaintiff, after being duly sworn, testified as follows:

Direct examination:

My name is A. Nelson. I live in Port Arthur, Texas. I am a switchman, and have been railroading about ten years; I worked for the Kansas City Southern a little over two years, from 1921 to 1923, but I had been railroading before that. All my railroading has been in the train service, braking and switching, and for the Kansas City Southern it has been braking, on both freight and passenger [fol. 123] trains, and I worked on the division out of Leesville to Port Arthur and out of Leesville to Shreveport; Leesville was a freight division. I know Mr. D. R. Ferguson, he was car inspector at Leesville. As a brakeman in and out of Leesville, I know the duties of a car inspector with reference to making up trains there in the yards at Leesville; if they were making up a train to go north, the train crew made up the trains there, they didn't have a separate switch crew, but the train crew made up their own trains; the first thing the train crew would do in mak-

ing up a train going north would be to get a caboose and start to build a train onto the caboose, and they would do that by switching such cars as are going out on the train up against the caboose, and as those cars were built up the car inspector would couple up the air hose and make the safety appliances, such as knuckles and brakes and inspect all the running gear of the car—suppose you set half a dozen cars in, and then another eight or ten in onto those, the idea would be to couple all those together when you shove them in, and the car inspector would couple up his air hose then, while you are making up the train. It was not the duty or business of the brakeman to ever couple up the hose, they would never couple up the hose, because that is the car's man's duty, and when the train was made up to go out the car inspector passed upon whether the equipment was in running condition and complied with the safety appliance laws, he was the boss of that. I had known Mr. Ferguson about two years; he was a man that worked regular, and was a good workman, and promptly discharged his duties there, right on duly all the time. I have worked out on the roads in the night time, and in those yards, and a road engine has got a brighter [fol. 124] light than a yard engine, and has more candle power; those headlights are parts of the equipment controlled by the safety appliance law. To take a road engine with the regulation headlight, such as they use there, and run it through a yard, a person standing or getting in front of that engine and looking toward the headlight as it approached, when the engine got in two hundred or two hundred and fifty feet of them, if it was burning full bright it blinds them, he just can't see, he couldn't see very far ahead of him, and I don't think a man could tell the distance a train was from him with that kind of headlight shining bright, but he could come nearer telling the distance the train was from him if the light is dimmed. Generally speaking, the road engines have a means of diminishing the lights on the road, dimmers, and the dimmers are to reduce the candle power, and they are used from right in the cab, after they get in the clear of the main line, in meeting other trains, they put them out, and I have worked with them where they would dim them going through yards and towns. As to whether the headlight of an engine shines right straight out ahead or it fans out, it fans

out, and any person crossing the track or coming in line with that headlight it would have the effect of blinding him, lake a man right straight in front of it. Some of the engines used lights—the dimmers, in going through the yards there at Leesville, and some didn't—there were quite a few trains made up in the yards there, and during the eight hours Mr. Ferguson would be working there would be about three or four trains made up, I imagine, on an average. I know the main line there, and in a general way I know about where Mr. Ferguson's body is said [fol. 125] to have been found—it is said to have been found between track No. 1 and the passing line, but I do not know the distance between those two lines, not exactly, but I guess something like eight or ten feet from rail to rail. I have passed along there on cars, and it would be about five or six feet in between those two tracks.

Mr. Ferguson was not a drinking man, not as I ever knowed of, he was sober every time I ever talked to him and met him. I knew he had his little family there and he was taking care of them, and he seemed to be attached to them, he always seemed to be.

This testimony is objected to by plaintiff and is introduced only in rebuttal.

Cross-examination:

If a man would get out in front of one of those headlights and look at it and it was burning bright it would dazzle him and he could not tell exactly how far the train was off from him.

Q. He couldn't tell under those circumstances—if he knew it was coming it would be a kind of admonition to get off of the track?

A. Why, yes, but it——

Q. When he can't tell how close it is he would get out of danger then wouldn't he?

— I figure he would, yes.

I don't know anything about this accident, I was not in Leesville at that time, I was sixty-five or seventy miles south, coming on an extra, north, and didn't know anything about what Mr. Ferguson was doing or how he come to be killed. I suppose he was acquainted with the arrival of

passenger trains, he was supposed to be, he worked there a long time and knew those tracks. I suppose that *dis-* between those tracks is what is called the standard distance, but some of them do not have them of a standard distance, I know some yards that won't clear a man on a box car but [fol. 126] between these two tracks the distance from rail to rail was about eight or ten feet, and about five or six feet clear—I never measured it, *of* course, and can't be accurate about it.

Redirect examination:

As to what effect the glare of a light that blinded a person would have on his ability to see around him, he would just be blinded—I have been that way myself, I have had trains come up on me—and take a flashlight and flash it in your face, it just blinds you for a moment, and you just stagger.

Recross-examination:

Q. You have always managed to stagger away from the train?

A. Well, I have never been hit by one yet.

STIPULATION OF FACTS

It is agreed by and between counsel for the plaintiffs and defendant, respectively, in open Court, that the freight train that was being made up was an interstate freight train, carrying freight from Louisiana to Texas, or Texas to Louisiana—in other words, had interstate freight on it; and that if the deceased, D. R. Ferguson, was in fact inspecting that train, he was engaged in Interstate Commerce.

[fol. 127] Counsel for plaintiffs introduced in evidence the American Table of Mortalities showing the life expectancy of a man at the age of sixty-two years to be 12.86 years.

Counsel for plaintiffs introduced in evidence a portion of the first interrogatories of the deposition of MRS. JEWEL LEWIS, which is as follows:

"Jewel Lewis is my name; I am nineteen years of age and I reside at 1501 Avenue B, San Antonio, Texas. My father's name was D. R. Ferguson; he is now dead, having died on the 12th day of February, 1922, he met his death in a railroad accident; at that time I was living in Leesville, Louisiana. I am now married, having married on the 25th day of September, 1922. Prior to the time of my father's death I lived at home with my father, who supported me as a member of his family. My father met his death by being run over by a passenger train of the Kansas City Southern Railway Company on February 12th, 1922, at or about 7:05 o'clock p. m., which was just about dark at that time of the year. I was at home when I heard of my father's death; my older brother came in and told us, but at the time my father was killed I was at Mr. Brogman's place, which is about a mile from my father's home, and we were just getting ready to leave to go home when the passenger train reached Leesville station that night. I distinctly recall the passenger train passing through Leesville that night. The whistle was not blown that night as the train came into the Leesville yard, nor was it blown between the stations of Staples and Leesville. The reason I am so positive of this [fol. 128] is: We were waiting outside of Mr. Brogman's for the train to whistle for Leesville as we were intending to start for home upon hearing the whistle. We were closer to town than the train would be and we figured we would get to Leesville before the train reached there if we started when the whistle was sounded, and inasmuch as we were in a car, waiting out in the road for the whistle to sound, expecting to start for Leesville upon hearing the whistle—being out there waiting and listening for the whistle, I am able to state it was not blown as I would have certainly heard it had it been blown. And the place where I was being situated about half-way between Leesville and Staples, I would have heard the whistle of the train had it been sounded at any time between those two places. The whistle on the train was not blown as the passenger train came into Leesville on the night of February 12th, 1922.

My reason for being so sure about this: I with a friend of mine was at the home of Mr. Brogman that evening and we were in a car, sitting out in the road in front of his house, waiting for the whistle to be blown so we could start for town, knowing we would beat the train in as we did not have quite as far to go as the train did, and after waiting for the whistle to sound and it did not, and the train being at the station, we left for home. So far as I was able to hear and know, the bell on the engine was not rung at any time that night as the train came into Leesville—as stated, the bell on the engine was not rung at any time that night as the train came into the station of Leesville, and my reason for saying this, is, as previously stated, we were sitting in a car out in the road in front of Mr. Brogman's house, waiting for the train to whistle for Leesville when we expected to start for home; therefore, my attention was directed to the train coming in, and situated as I was, I know I would have heard the bell had it been ringing. I would say that Staples and Leesville are between a mile [fol. 129] and a mile and a half apart, something like that. The bell was not rung at any time that night between Staples and Leesville; nor was the whistle blown at any place between Staples and Leesville, and so far as I could hear the bell was not ringing either—being out in the road waiting for the train to whistle for Leesville in order to start home, having my attention drawn directly to the on-coming train, waiting and expecting to hear the signals sounded, I am quite sure, under the circumstances, had the whistle been blown or bell rung, I would have heard both. At the time of my father's death my mother was dead, I would say she had been dead about seven months at the time my father met with the accident that resulted in his death. At the time of my father's death I had one sister and one brother older than myself, and two brothers younger, which composed the family at the time my father was killed. At the time of my father's death I was living at home and was being supported by him. My older sister handled my father's pay checks, and the money was used in the support and maintenance of the family, and education of the children. My father was very kind, affectionate and considerate to all of us children, he took great interest in all of us children, he wanted us to go to school and get a good education, and

was always advising us between right and wrong—he being a mother as well as a father to us. My father was very fond of all of us, but more so of the youngest boy, he being the baby of the family, and we all naturally thought more of him than the rest, on that account. The last time I saw my father alive was about two o'clock of the afternoon he met his death, just after the first passenger train run. Up until I was about grown I attended both Sunday School and [fol. 130] Church regularly; and after I stopped going to Sunday School I kept up going to Church. My father wanted all of us to go, not only to Sunday School, but also Church, and it was on his advice and at his request that we attended regularly. I attended the public school at Leesville. My father was very much interested in my going to school, as well as the rest of the children; he wanted us to have a good education, and did all in his power to give it to us. My father was always talking to all of us as to the kind of life we should live and who we should have for our associates. He was very much interested in our home and what we did, as well as who we went with. I have two brothers younger than I, being fourteen and nine years of age, respectively, and I have often heard my father talking to my two younger brothers prior to his death, as only a father would who had his children's interest at heart; he advised with them, told them who they should associate with and what they should do. He talked with them in a fatherly way, giving them good advice and impressed on them to always stay out of trouble. My father was interested in the education, welfare and training of the boys; he took great pride and interest in them and what they did. My mother had been in ill health for some three or four years prior to her death. She died in Los Angeles, California.

Counsel for defendant introduced in evidence the following portion of the cross interrogatories and answers thereto of the witness, Jewel Lewis:

[fol. 131] "I testified on the previous trial of this case. I would say Staples and Leesville are about a mile, or a mile and a half apart, something like that. To the best of my knowledge and memory, the track between Staples and Leesville is straight. My father had been working there in

the yard at Leesville for a good long time. From the character of my father's work, and the length of time he had been working there, I would imagine he was familiar with the time the train in question was due to arrive at Leesville. To the best of my knowledge, the train was about on time the night my father was killed. I was not inside the house at the time the train passed Mr. Brogman's residence on the night in question. I was sitting in a car, in the road, in front of the house when the train passed that night going into Leesville. I would say Mr. Brogman's house is situated somewhere between a half of a mile and three-quarters of a mile from the railroad, facing north, and is on the lefthand side of the railroad. Mr. Brogman's house is about a mile from Leesville. Miss Jackson was with me at the time I was at Mr. Brogman's house listening for the train to whistle for Leesville; of course, the Brogman family were at home, too."

Counsel for plaintiff introduced in evidence the following portion of the cross interrogatories and answers thereto of the witness, Jewel Lewis:

"I could not see the train from where I was as it came from Staples to Leesville on the night my father was killed, by reason of there being some brush to obstruct the view, I can not now say if I heard the whistle sounded or bell rung on the night before or the second night before my father [fol. 132] was killed, there being no incident connected with the two nights to impress the matter on my mind. There is no one present, either in sight or hearing during any of the time my depositions and answers are being taken outside of the notary and myself.

Q. Do you mean to say that you, being a mile off in Mr. Brogman's house, could testify positively that the bell of the train was not ringing when passing through the yard at Leesville? If you mean to testify this positively, then explain how it is that you can so testify when you were a mile away from Leesville.

A. I have not testified that I was inside Mr. Brogman's house on the night in question when the train passed that point. Mr. Brogman's house is on the slope of a hill and you can hear every sound in the yards, and being late in the evening, in the winter time, and being on Sunday, it

was easy to hear the train as it came into the Leesville yard. On this account, and for the reasons stated by me in my answers to Direct Interrogatories 12 and 16, I am able to state that the whistle was not blown or the bell rung as the train came into Leesville on the night in question. At Mr. Brogman's house the night I was listening for the train to whistle for Leesville Miss Jackson was with me; of course, the Brogman family were at home, too.

Counsel for plaintiffs introduce in evidence a portion of the deposition of N. KIRKLAND, taken before P. L. Ferguson, Notary Public in and for the Parish of Vernon, Louisiana, on the 26th day of August, 1922, which is as follows:

[fol. 133] "My name is N. Kirkland; I am forty-three years old; my residence is Leesville, Louisiana, and I am a locomotive truck repairer. I have been living in Leesville, Louisiana, for the last six or seven years. I knew D. R. Ferguson before his death. I remember the occasion of Mr. Ferguson being struck by a train, and being killed while working in the Kansas City Southern Yards, in Leesville, Louisiana, on or about February 12th, 1922. I heard about it the next morning after he was killed. On February 12th, 1922, I was in Leesville, Louisiana, but went to Shreveport, Louisiana, on train No. 2, on the 12th, and was in Shreveport the following day, and I shook hands with Mr. Ferguson at the train at two o'clock, February 12th, 1922, and I talked with him at two o'clock, p. m., on February 12th, and our conversation was with reference to him sending some lodge dues by me to Shreveport, the next time I came down there; the lodge dues were the Brotherhood of Railway Carmen of America; at that time he was inspecting the train No. 2 of the Kansas City Southern Railway Company. I had known Mr. Ferguson prior to his death for six or seven years, and was intimately acquainted with him. I did not consider him a drinking man, and never have known of him taking a drink while on duty, and have never at any time, seen him drink or under the influence of liquor. There was nothing unusual in Mr. Ferguson's appearance, conversation or actions at the time I last saw him

which would indicate that he had been drinking. The last time I saw Mr. Ferguson he was at the Kansas City Southern Depot at Leesville, Louisiana, at two o'clock p. m., on February 12th, 1922."

[fol. 134] Counsel for plaintiffs introduced in evidence the testimony of NICK FRANKLIN given on the former trial of this case, which is as follows:

NICK FRANKLIN, a witness for plaintiff, after being duly sworn, testified as follows:

Direct examination:

"My name is Nick Franklin. I live at Leesville, Louisiana. I knew D. R. Ferguson in his life time, and had known him about fifteen years; he was car inspector when he got killed, and I was also a car inspector, we were both car inspectors at the same yard, for the Kansas City Southern Railway Company at Leesville. Mr. Ferguson went to work at two o'clock in the afternoon and worked from two to ten o'clock, and then Mr. Harwell followed him, we went on at ten o'clock, and worked from ten until six o'clock in the morning; I went to work at six o'clock and worked until two; that made three shifts for car inspectors. We did not change around, six o'clock until two was my job, and his was from two to ten o'clock. I was familiar with the duties of a car inspector there in the yard at Leesville, and the manner in which the work was done. I knew Mr. Ferguson and had been about him in the work, as he did his work. I heard about Mr. Ferguson being killed the same night that he was killed, I was called to work myself. I was at home when I first heard about it, and I went over to work in his place, I was called; I don't suppose it was over five or ten minutes after I heard about Mr. Ferguson [fol. 135] being killed until I went over there to work, I went right on over there, and when I got over there I saw Mr. Ferguson's body. The main line of the railroad running from De Quincy to Leesville, on north, is on the West side of the yard, and Mr. Ferguson's body was on the east side of the main line of the railroad, on the west side of the track next to the main line, between the main line and track No. 1. I knew at that time where Mr. Ferguson

lived; his body was a little southeast of his residence, I guess, a little east and a little south, that is my recollection. I saw him there on the ground and I noticed a torn place on his jumper, somewhere along about there (indicating), but I don't remember which side of his body it was on. The torn place on his jumper was in the ribs below the shoulder, but I don't remember which side it was on. There was nothing on the main line track at that time, the main line track was clear, but there was a train being made up on the track immediately east of the main line track, on track No. 1, when I got down there, and I went over that entire train that night and inspected the entire train, and I inspected it in a way that I usually inspected it. The usual practice of inspecting the train was that we would go up each side, up one side and down the other, and make a general inspection of the cars and test the air and see that it was all right, and inspect the safety appliances, I inspected this train in that way on that night. There were about fifteen cars on that train south of where Mr. Ferguson's body was found, I suppose, something like that, and all of those cars had the air hose connected up, but the air hose on the cars north of his body had not been coupled up.

Q. Now in making up a train in the yard as the train was [fol. 136] being made up on this track that night, what was the customary way in which the inspector would perform his work? We will say, for instance, that the caboose and three or four cars were set in on the south, as the train was going north, on the south end of the track to which you were going to build the train—now, where would the inspector be with reference to those first cars, would he get to them?

A. Yes sir, he would go to the first cars put in there and couple them up and inspect them, and as car after car came in, after they later set in two more cars and coupled on the three already there, for instance, the inspector would couple up the air on them and inspect them as he would put them in there. Generally he would go on one side and inspect them as they were going in there, and as they finished up the train he would go down the other side, but there was no fixed rule that would keep him from going over and looking at the other side while he was waiting for other cars; he did it in the most expeditious way, owing to the

speed the cars were being put in. The inspector would make light repairs, if he found light defects he would repair them, and then in the process of his work he would keep on building the train up as I have described until it was finished. In inspecting the cars or coupling up the air where cars are put in, like these books, say toward you is a bunch of cars already connected up, and the air coupled up, and one or two or more come in and are coupled into this string of cars, ordinarily he would start to doing his work at this first one, he would start at the hind end of them and keep coming on up as they coupled on. As two or three more cars came in and were coupled up he would couple the air hose at this place. He would have to go in between to couple the hose he would not necessarily have [fol. 137] to go in there to inspect the knuckles and appliances to see if everything was all right, only to couple the air, and after coupling the air he would go to the next place and perform the same work and make the same inspection and keep that up until he would get to the end of those cars, and then he would stand around there and wait for more cars, his place would be at or about that end of the train. In making the coupling of this air, after finishing that he would step out between the tracks and go up to the next coupling and do the same thing and then step out, that was the customary way in which it was done. I am familiar with the yard there at Leesville, and was at that time. In my judgment the distance between the east rail of the main line track and the west rail of the track next to it would be about eight feet, I suppose, from rail to rail, and with a train of cars there on the east track and then cars on the track west of it, the space between the cars, in my judgment, would be around four or five feet. I have observed the cars on those tracks and a man walking through between them, but I don't know how much more space there is than his body would occupy, generally we went down there between them with a wheelbarrow, but there was not room enough to turn around, about four or five feet in there, but the wheelbarrow would be below the body of the car and there would be room for a wheelbarrow between the cars. I do not know the width of a box car over all.

Cross-examination:

I don't know whether it was really an hour after Mr. Ferguson was killed before I got down in the yard at this place or not. I was thinking about forty minutes, or an [fol. 138] hour, somewhere along about that time. I do not know exactly what position the cars were in on track No. 1, immediately east of the main line at the very time Mr. Ferguson was injured. I had been working in the yards a good long while, and my duties carried me all about over those tracks in the yard; any man working in the yard became familiar with the distance between the tracks, and all of that. I knew when this train came in, the time of the arrival of all of the trains there, as an inspector in the yard, and Mr. Ferguson knew that, too. When I was in the yard there I was expected to look out for the trains that might be moving about there, that was a part of a man's duty, to watch out of the train and keep out of the way of moving trains. I was at home that night when this train called the "Plug" running from Lake Charles to Shreveport, came in. The place where I live is not over three hundred feet from the track or the place where Mr. Ferguson was killed. I heard that train come in, and then heard of Mr. Ferguson's death, and I went over there and went on with the inspecting of this train that was being made up that I understood was there at the time he was killed. That is a good big yard at Leesville, a good many trains are made up there, and there is a round house there, and a man working in that yard has to work around a good many trains. As to whether it was a part of my duty to inspect this passenger train, too, when it came in, at that time we had instructions if we wasn't doing anything, to be around the passenger trains when they came in—if I wasn't busy to inspect them, too, and look over them. I carry a regular inspector's lantern at night, it is a lantern built as a regular burner lantern, with a hood around it, with a reflector in the back of it that throws the light all one [fol. 139] way; the object of that is so that I can see in between, if I want to inspect I can take that and throw the light in there and see it, if I want to inspect a wheel or see inside I can do that; that is what is called an inspector's lantern. That was the standard width between those tracks there, I think, what is known as the standard width. I

think Mr. Ferguson had been working in that yard ten or eleven years; he was perfectly familiar with the width of those tracks, and I and everybody else that worked in there were.

Counsel for plaintiffs introduced in evidence a portion of the deposition of HARRY J. (SHORTY) HOYT, taken in 1922, which is as follows:

MEMO RE DEPOSITION OF HARRY J. HOYT

The depositions of this witness have been lost. He was not a witness to any fact concerning the accident or the condition of D. R. Ferguson, and his evidence was cumulative of the manner of making up and inspecting trains.

Counsel for plaintiff introduced in evidence a part of the testimony of ANDREW SMALL COX, fireman on passenger train, given on the former trial of this case, which is as follows:

[fol. 140] ANDREW SMALL COX, a witness for the defendant, after being duly sworn, testified as follows:

"Direct examination:

I didn't know anything about Mr. Ferguson's being killed or injured when I got to the depot of Leesville. I first heard about it at Many, and I noticed blood on the pilot, on the ribs, step and pilot beam; it was on the right step and was red blood. I then went to Shreveport. I didn't notice whether this was fresh or old blood.

Cross-examination:

As if this table in front of the jury represented the main locomotive, and the tender was back towards the judge's stand, there, the step about which I have been testifying was at the front end of the engine, toward the jury, and the pilot beam about which I am talking was on the front end of the engine. I said I saw blood on the pilot beam, on

the ribs of the pilot or cow catcher and on the step on the right side of the engine. The blood was all over the pilot beam, scattered different places and in spots, on the right hand end of it, that is the engineer's side of the engine, it was all over the end of it, scattered around in different places, on the front of it. I didn't notice whether there was any on the end of it or not, but I saw quite a bit of it on the front, a considerable bit of blood in several places, on the ribs of the pilot there was some blood, and on the steps, on the right hand, below the end of the pilot there was quite a quantity of blood. It didn't look like something had bled [fol. 141] there pretty profusely, it was scattered in spots."

A. Nelson, a witness for the plaintiff, being recalled testified further as follows:

Redirect examination:

Where two trains meet on the road, it is the custom that the main line is on the clear and puts her light out, and where they have a wait order, just like you coming south on one and had to wait, he would dim his light to let them know he was there. That is what we always work by; the man that is in the hole will wait and the fellow in the passing track will put the light out, that is where one train has gone in to take siding for the other train to pass. One train would not pass along if the engine was standing there with the headlight burning, because it would mean that he had not come in the clear on the main line, and when they turned it out that means that the main line is clear. They do not dim it for the passing track, but they turn it out. When they turn the headlight out that still leaves some indicator lights, showing the number of the engine, aside to the headlight.

Recross-examination:

When a train is on the side track and another train is on the main line, the one on the side track that is standing still is the one that puts his light out. I can recollect seeing a [fol. 142] passenger train come into the station at Leesville, or on the Kansas City Southern with its light dimmed,—I have been working with them where they did—I don't know that I ever did on a passenger train, I don't work much

on them, but I think I have seen that on the T. P. I don't remember about the Kansas City Southern, but I have been working on trains when they would pass through and dim their lights.

Plaintiff introduced in evidence the testimony of Rupert Ferguson, given on the former trial, as follows:

RUPERT FERGUSON, a witness for the plaintiff, after being first duly sworn, testified as follows:

Direct examination:

My name is Rupert Ferguson; I live at Leesville, Louisiana; I am a son of D. R. Ferguson. I remember the time my father was killed there in the yards at Leesville. I remember the date, it was on Sunday night. I remember the circumstances of the passenger train coming into Leesville from Lake Charles. I was at my father's house at the time it came in; his house is about a half block from the railroad track, something like that. Yes, I recall that when the passenger train came in and passed the house I was standing on the back porch; before that time I had been in the kitchen, it is right behind the back porch, the porch joins the kitchen; my sister Ona was on the porch, Mr. Carlisle was on the porch with her. I heard them discussing the train before I went on the porch. As the passenger train passed my place going into the station the bell wasn't rung, and the whistle had not blown before it passed our place. [fol. 143] Before that time I had seen the passenger train passing going into the station at Leesville, many times. We have been living at the place where we now live about a year, something like a year. I noticed the speed of this train was much faster as compared with other kind of passenger trains that come in there; yes, sir, much faster. The speed of this train was ten or fifteen miles faster as compared with the speed that they come in at other times. Yes, it was going much faster. I did not go down to where my father was killed that night.

Cross-examination:

I had been up to the restaurant that afternoon, and I came home about 4:30 or five o'clock and was sitting around

there. I had seen my father, he came home between 5:30 and six o'clock, or a little after six o'clock. He came home last at 5:30. He did not come home twice while I was there; I stayed in the front part of the house and didn't notice it if he came but once, and that was about five-thirty or six o'clock. He came for supper and we didn't have it ready and he drank some coffee. My sister was attending to getting supper; Mr. Carlisle and me and my sister were there; Mr. Carlisle had been there about thirty minutes before my father came. He (Mr. Carlisle) came in a car, I saw him drive up. I wasn't watching for the train, I was waiting for the train, I was waiting for the train, I came home to eat supper, I was going to eat with father when he came, and he came and they didn't have it ready and he went back to work, and he said he would come back as soon as they [fol. 144] got that extra train out, and he said he would come back as soon as they got that extra train out, and he said he and I would eat. The others were not going to wait for him, just he and I were going to eat; I wasn't watching for the train when it came in. I didn't watch this particular train all the time it came in. My sister and Mr. Carlisle were standing on the porch and they arguing about it, she said it was an extra and he said it was the Plug, and she said, "It didn't blow" and he said, "That's right, it didn't blow," and after it got up there—he said it was the Plug, and after it came on up he said, "I told you it was the Plug," and she says "I thought it was the extra because it didn't ring the bell and didn't blow, and was going much faster than usual; that is what my sister said to Mr. Carlisle; no, he didn't it didn't ring the bell and it didn't blow the whistle and was going much faster than usual; she said it didn't blow the whistle nor ring the bell and was going much faster, and he says, "that's right, it didn't do any of the three." Yes, I come out on the porch before they said that. I came out before the train got there; I wasn't standing there when it left Staples; I didn't hear it leave Staples. I could hear it; yes, sir, it was making a good deal of noise. Yes, sir, I could hear it from my house down in the yards; yes, I could see the headlight when it got pretty close to the house, down there about those negro houses; I saw it then; it had an electric headlight, bright and shining out. The night before when it came in I was

hunting, I had gone hunting; I wasn't in town; I was there the night before when it came in; at the time it came in I was standing down at the restaurant across from the depot; I do not remember where I was the next night when it came. Mr. Carlisle, my sister and me have not talked this over any, since; never have mentioned it among ourselves; not [fol. 145] much, just once in awhile. Mr. Carlisle has been at our house pretty often since then. He doesn't stay there at our house all of the time; he comes pretty often; he is no kin to me. We have not talked it over a few times, just mentioned something about, we mentioned when the train would come in may be, some nights he would be at the house and he said, "Now, the train is going much slower than it was the other night." We watched that.

Plaintiff introduced in evidence the testimony of K. D. Ferguson, given on the former trial, as follows:

"K. D. Ferguson, one of the plaintiffs, after being first duly sworn, testified as follows:

Direct examination:

My name is K. D. Ferguson; I am a son of D. R. Ferguson. I remember that my father was killed in the yards at Leesville; I was living there then, living there then; living with the family. I recall where I was when I first learned my father had been killed; I was at the depot; I had been home for some little time before that, that afternoon I had been at home; I can not recall just what time it was when I left home, but I had left home; I remember when the passenger train came into the depot that night I was up there at the little Church, about three or four blocks from the depot. When the passenger came in I did not pay any attention to whether the whistle blew or the bell [fol. 146] rung, I wasn't studying about it and didn't have it on my mind. I don't know whether the bell rung or the whistle blew. Between the time the passenger train came in and the time I hear my father was killed I went from the Church down to the cafe and stayed down there a few minutes, between the Church and the depot, and then I walked over to the depot and Mr. Anderson was coming

this way, going down to the yards, and he said "K. D. have you been down to the yards yet?" I said "No", and he said "The old man is cut all to pieces down there," and I run down to where he was laying. I saw my father when I got down there, right between the two tracks, the main line and the next track to it; between the two tracks [illegible] were there; they had some lights; I recall that my father was lying on the ground, kind of on his side and he was dead; he had on overalls and a jumper; I noticed that the jumper was torn on the back side, and it was as bloody as it could be; the jumper was torn to right along in there (indicating); right along under the arm; about half way between the hip bone and the armpit there, up in the ribs like; I went and seen him and then I went to the house and told the girls; told the family; I went with my father's body from there to the undertaking establishment, but I did not see him dressed at the undertakers; I didn't see him anymore until after he was dressed for burial. When I saw him there in the yard I saw this injury, it was the left side; I don't know the name of the lantern my father used for working with; I know the lantern; I saw it there that night; the lantern was further from the depot than my father's body, it was right due south. The lantern was setting down between the tracks, facing east, towards the freight train that was being made up, at the time I went down there. The lantern was, with reference to the box cars on the [illegible] right at the end, [fol. 147] facing toward the [illegible] and setting right between two tracks. The lantern was between forty and sixty feet south of my father, in my judgment.

Cross-examination:

The lantern was setting near the end of a freight car was it. I couldn't say right there, whether the end of that freight car was towards the depot, because you see the end of the car, I couldn't tell, there was some more cars on there, the train had come backing in. I don't know about what the arrangement was when the accident occurred; I couldn't say about that. Yes, I have been home the evening the accident occurred; it was late that evening, I couldn't say just what time, it was after five o'clock; yes, sir, I was there after five o'clock, but I couldn't say just what time it was; I had been at home off and on, up town

and back to the house that afternoon; I had gone backward and forward to town".

Plaintiff introduced in evidence the testimony of Travis Barnhill, given on the former trial, as follows:

"TRAVIS BARNHILL, a witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination:

My name is Travis Barnhill; I live at Leesville; I have lived in that neighborhood for eight years. I knew D. R. Ferguson during his life time; I knew him the eight years I lived at Leesville; I am a young man, eighteen years old. [fol. 148] I remember the circumstance of Mr. Ferguson getting killed in Leesville, about the 12th of February of this year. The night he got killed, at the time the passenger train running from Lake Charles to Shreveport went into Leesville, we were going to New Lono, to Staples, Lono Colony, a mile and a half south of Leesville; we walked down there; when we left the restaurant we went down the street and cross over the track; we struck the track below the passenger depot, right about the old Union Warehouse there, I judge that is about a block south of the depot; no sir; we didn't get on the track there; there was a switch through there, and we went down the side of the switch until we struck the main line, and then we went down the main line; the direction we went was straight south, due south; when we went south we were right in the main line track, walking down the middle of the track; I don't know whether they had walked in the middle of the track, there is a path on the right hand side of the track going south, and on the left hand coming up, I don't know, we was just walking down the middle of the track, there wasn't any room in the path. After we got on the track and started south we saw Mr. Ferguson. I knew where Mr. Ferguson lived at that time; when I saw him that night he was east from his house; his house is off west from the railroad; when I saw him he was standing, he was just opposite of the main line, on the East side of the main line; where he was standing we could see his lantern; I don't

know whether it was on the end of the tie or not, but facing the wheels of a car, the lights were shining on the wheels of a car; I don't remember what kind of car, whether a Gondola, or what kind, but some kind of a car. His lantern was shining towards the wheels of a car: I don't know the [fol. 149] difference in an open lantern and one with a reflector, but it had a bulk of a thing on there that made it reflect; I mean reflecting towards the car, I mean a bulls-eye; he was standing there, facing the north; that is, toward the station, his right hand was on the side of the car, like this desk was the car, and up toward the jury was the depot, toward the jury would be north, and his right hand was on the car; that would put him on the west side of the car toward the main line track, but he would be at the north end of the car; in my judgment he would be right at the end of the car; the lantern was behind him and he was standing there with his hands against the car; as to the position of his hands or arm, you couldn't tell hardly whether it was down straight or up higher, it was dark. He was standing with his face towards the depot, we passed him going on south; I saw the passenger train after I passed him, it was going north towards the station. When the passenger train met me I was about three quarters of a mile from the station, could be further or not that far, but somewhere in that distance from the station. As to where Mr. Ferguson was when I passed him, with reference to his house, I was going south down the track and had gotten as far as his house, I think we were a little beyond his house, passed a little beyond it, as well as I can remember. When the passenger train passed going north, I was approximately three quarters of a mile from the station, I judge it to be about that far. When the train passed us going into the station it was running pretty fast. As to what attracted my attention to make me say it was running fast, one thing, it didn't blow the whistle, and was running so fast; I didn't hear the bell if it rung. After we saw Mr. Ferguson, before we met the train, we got off the track until the train was [fol. 150] coming, we kept going until we got off for the train; way down the track, on the right hand side going down, a good many people use it, not so many either, it keeps the path beaten open.

Cross-examination:

My name is Travis Barnhill; when I passed Mr. Ferguson he didn't have his lamp in his hand at all; I remember seeing the lantern, I don't remember whether it was on the tie or down between the tracks; that was about 6:45 when I saw him, somewhere along there, I didn't have any time piece; but that is my judgment about it; yes, somet-ing like that. The next day after this matter transpired I gave a statement about it, in writing, and signed it; the matter was fresher in my mind at that time, I have forgotten some of it since then.

Q. Now, in this statement I will read you this, it says: "I would judge at the time we passed Mr. Ferguson it was about 6:45 p. m. on February 12, 1922." Is that the date as you now recall it?

A. Yes sir. This train did not pass me about even with the Kansas City Southern Section House, it was below the section house, south of the section house, the south end. The section house is south of the yard, and when the train passed me I was south of the section house just a few steps below the section house. I don't think it was hardly fifteen or twenty minutes after I had seen Mr. Ferguson that this train passed.

Q. Now, I will ask you if this is correct, I will read this: "601 passed us about fifteen or twenty minutes after we had spoken to Mr. Ferguson?"

A. That is what is down there, all right, but I don't think I gave in that "fifteen or twenty minutes" statement there, it couldn't have been over fifteen minutes anyhow. [fol. 151] I did not hear the train whistle for Staples, and I didn't hear it whistle for the road crossing south of Leesville.

Q. Now, I will read this to you and ask you if you made this statement: "I heard Extra 601 whistle for Staples and also whistle for Road Crossing at South end of Leesville Yard; Staples is one and a quarter miles south of where we passed Mr. Ferguson is about three quarters of a mile; I didn't notice train whistle for Leesville station; bell was not rung when Extra 601 passed we boys; headlight was burning on 601 and was very bright; I would judge speed of train when the train passed us thirty miles per hour, and

when mile or more from Leesville station; track is straight from where train passed us to Leesville; in fact just this side of station to Leesville station; I didn't notice anything unusual about Mr. Ferguson as we passed him," didn't you sign that in the presence of Mr. Webb Wynn and Mr. Alexander?

A. I didn't know Mr. Wynn; that is my signature all right; I'll be dog-goned if I can remember; yes sir, I say I don't remember whether I did or not, to tell the truth about it.

Redirect examination:

When I signed the paper that was shown to me I was in some little office south of the station a few steps; I don't remember whose office it was, some office below there. This man Alexander I think is Claim Agent for the Kansas City Southern; I don't know how we happened to go up there, but I understood he wanted to see us fellows; I got that information and went up there; I think that was on the 13th, and Ferguson was buried on the 14th, I think. Well, when I answered those questions and signed the statement I think I was the only boy in there with the claim agent. [fol. 152] None of the Fergusons were there, nobody representing them; yes, just the railroad represented; they asked me questions there at the time; I answered the questions as he asked them; I did not write down the questions and my answers to them, and the best I can remember I think he answered them; Alexander wrote it up. I did not see the questions that he asked me about, but as well as I remember I read it over before I signed it. As to the gait I was walking in going from the place where I saw Mr. Ferguson to where I met the train, we were knocking along, kind of poking along, wasn't making any time at all; we didn't stop at all. I couldn't say just where this road crossing is south of the yard there, or how far that was from where I met the train, but it is somewhere below where I met the train, something like three or four hundred yards I judge.

Recross-examination:

I have talked with Mr. Leonard Jones about the Ferguson case recently, but I have not talked to Mr. Sexton. Mr. Leonard Jones was down at Leesville representing the

Ferguson family, later, but wasn't anybody there at the time I signed the statement. There wasn't anybody representing the railroad or any of the railroad crowd there at the time Mr. Leonard Jones talked to me and got that statement.

Plaintiff introduced in evidence the testimony of Reed Holton, introduced on the former trial, which is as follows:

[fol. 153] "REED HOLTON, a witness for the plaintiff, after being duly sworn, testified as follows:

Direct examination:

My name is Reed Holton; I live at Leesville, Louisiana; I am twenty-one years old; I knew Mr. D. R. Ferguson, I had known him some five or six years. I remember the circumstance of him being killed there in the yards at Leesville, I heard about it after he was killed; on the night that he was killed I went from Leesville to Staples; in going from Leesville to Staples I went around the main street to just this side of the Standard Oil Station and I crossed there, on the main line track on the K. C. S. going south, and went down that track; after we got on the main line track going south I saw Mr. Ferguson. As to where I saw him with reference to his residence, well, I couldn't say exactly, but it was somewhere just opposite of where he lived, it might have been just a little below, the best of my recollection. It was opposite where he lived; there wasn't any cars on the main line, but some on the track next to the main line track; they were freight cars; why, when I seen Mr. Ferguson they were box cars, there were box cars at the north end of the train, but I didn't notice about the other end of the train. Mr. Ferguson was standing by the north end of the car; he was standing on the west side of the car; his lantern was setting right down by him, facing east; that was facing the car; well in my judgment Mr. Ferguson was standing probably two feet, he had his hand on the car. He had this hand on the car, he was standing just like this, only he had this hand here on the car (indicating), something like this, standing in that position; yes, sir, I purposely cross my feet to indicate that [fol. 154] that was the way he was standing, and in my

judgment his body was about two feet from the car, probably two feet. There was an engine switching in the yard just a little north of where he was, on the east side of where h/ was at, and north of where he was. We went on from that place down toward Staples; we did not stop and talk to Mr. Ferguson, I just spoke to him and he spoke to me and I went on. Then he was standing between the main line and the track on which the cars were located. After I went on South I saw the passenger train; when the passenger train hit him I was just south of the section house; that is something like three-quarters of a mile from the depot; I got off of the track for the passenger train to pass you. I didn't notice anything unusual or peculiar about the passenger train that night only that it was running faster. I had seen the passenger trains come in the yards there before that a number of times. The speed of the passenger train the night that Ferguson was killed, as compared with the speed of the train on other nights, was some ten miles faster; that is the way it appeared to me; that attracted my attention; the whistle was not blown between where the train passed me and Leedsville that night and the bell did not ring in my hearing between where it passed me and Leesville, if it rung it was where I couldn't hear it. Usually when passenger trains would go into Leesville from the south the whistle would be sounded between the place where this train passed me and Leesville. Well as to passenger trains going into the yards and the bell being rung, I couldn't say about the bell—they generally rung in the yards, when they got in the yards they started to ringing it and rung it until they got to the station; generally, they did.

Cross-examination:

[fol. 155] My name is Reed Holton. As to where I usually was when I observed the speed of the train coming into the yards there, sometimes I was down in the yards at the round house and at the depot between Staples and Leesville, and up along in the yards a number of times that the train was coming in; no, sir, I didn't work in the yards; I am a truck foreman at present, running these automobile trucks. I am foreman for Car Construction Company. No sir, I am not working for Carlisle, nor under him; he and I

are on the same job; I am working with Mr. Carlisle on the same job. He and I never talked this case over. No, sir, I haven't talked to him about the case, because I stayed at the camp and he was in town, and we were never together. He has charge of that part of the work where I am working. He doesn't hire me, D. E. George hired me, I was hired about five months ago. Yes, I heard this train whistle for Staples; I did not hear it whistle for the railroad crossing this side of Staples; I could see it as it was going down the track; it had a headlight, but I don't know how bright it was; yes, I heard the train coming, it made a good deal of noise, that is how I came to notice it; I generally notice every one that comes by if I am close enough, but this one attracted my attention more than the rest of them. No, sir, I never heard it blow for the crossing. I made a statement the next day after this occurred, but I never made it in writing; I signed it but I didn't read it. I didn't read it because I thought the man was honest enough to write it down right. There were two men there; I didn't read it over, it was read over to me. Yes, that is my signature. In that statement made the next day the matter was fresher in my mind than it is now.

Q. I will ask you if you didn't make this statement: "I live north of Leesville with Mr. Joe Holton, my father; I [fol. 156] am twenty-one, and in company with Travis Barnhill and Ellis Dowden; we were going down the K. C. A. to a show at Staples on February 12th, 1922, and when about even with the Standard Oil Station at about 6:45 p. m. I noticed Mr. D. R. Ferguson, car inspector for the K. C. S. whom I had known for several years standing at the end of a string of cars between the main line and track No. One; his lantern was lighted and setting on the ground between the main line and track No. One facing east; Mr. Barnhill spoke to Mr. Ferguson and Mr. Ferguson said 'Howdy boys;' it was dark at this time; about fifteen or twenty minutes after we passed Mr. Ferguson Extra 601 passed us going north at a speed I would judge of thirty miles per hour; I heard Extra 601 whistle for Staples, also for road crossing which is just south of Leesville yard and about three quarters of a mile south of where we passed Mr. Ferguson; headlight was burning on 601 and was very bright; track was straight from where road crossing

whistle was sounded to Leesville station; I did not notice whistle for Leesville station, can't say whether whistle was sounded or not; bell was not rung when Extra 601 passed us; train passed us about even with K. C. S. Section House which is located near south end of Leesville yard; I didn't notice anything unusual about Mr. Ferguson as we passed him." Now, didn't you make that statement?

A. I made it all except that whistle being blown for the road crossing. Yes, I made that statement about hearing it for Staples, and the statement is correct with that exception.

[fol. 157] Redirect examination:

At the time I made this statement to the Claim Agent we were in the Yard Master's, I mean Roadmaster's Office at Leesville; I went there because he sent for me. He asked me some questions; he would ask me some questions and I would answer them, and while I was talking he was writing. In answer to his questions I told him just what I have sworn here this morning, as a witness.

Recross-examination:

I wasn't forced to go up there; I went up there voluntarily. I got out of bed sick and went over there. I went over there because he sent for me. I have not given statements to the other side in this case; I have not talked with the other side. Mr. Leonard Jones came to me and asked me did I know anything about it, but I didn't tell him about the details of the case; he didn't ask me about the details, and nobody has since asked me about the details, nobody at all.

Plaintiff next offered in evidence the testimony of A. H. Thorla, on the former trial, as follows:

"A. H. Thorla, a witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination:

My name or initials are A. H. Thorla; I live at Leesville, Louisiana; I have lived there about two years; well before

that time I have lived in Vernon and Sabine Parish, and [fol. 158] at the mill for twenty-two years. I knew Mr. D. R. Ferguson before his death; I lived on the east side of the railroad before his death, and he lived on the west side of the track; well, I lived just across the railroad yards, I suppose it is something like a half or a quarter of a mile from where he lived. The track of the Kansas City Southern Railway that runs from Lake Charles, or from De Quincy to Shreveport runs through the town of Leesville north and south, and I live on what is called the east side of the road and Mr. Ferguson on the west side. Mr. Ferguson's business or occupation was car inspector. I had known him fifteen or eighteen years; yes, sir, I knew him pretty well. I heard about Mr. Ferguson's death; I heard it in a few minutes after he was killed; it was the same night; I ate my supper at my own home that night; after I ate my supper I went to my daughter's. My daughter lives on the west side of the railroad track; she lives on the west side of the railroad track, the same side that Mr. Ferguson lived on; with reference to the depot she lives due west, in the middle of the second block. When I go from my home to my daughter's I travel north, up the street to Mr. Dawkins' residence, and then across the railroad yards, northwest. Where I went across the yards carried me something like three blocks down south of the depot at Leesville where I strike the railroad. I know where the main line runs through that part of the yard on which the passenger trains run; I know that just east of that there is another track along through there, and then there is another one, and another, and another, several tracks. I crossed the track next to the main line, going west or in a western direction, I went in the open way in the yard, that people travel, it strikes about the center of the switches in the yard, a foot path through there. I saw some cars on the track next to the main line there, I didn't [fol. 159] notice how many there were in there. They extended back south of where I was, I passed the north end of that string of cars. As to how close to the north car I passed it was thirty or forty feet; I was east from the north end of the car when I passed it. I didn't cross the track there, I went up the yard further north. When I passed that car that I spoke of I saw Mr. Ferguson walking

around there. With reference to that car, he was next to the track, like he was coming right along the track, right at the main line, about that first line of cars; he was facing north coming towards me, but I was traveling pretty fast, and I went on; Mr. Ferguson was right about the end of those cars when I saw him; he had a lantern in his hand. After I saw him there I went to my daughter's, I went right straight to my daughter's; in going to my daughter's I went up by the depot and turned off and went up to her house, I turned to the left and went to her house. In going from the depot to her house I went a block and a half. Between the time that I last saw Mr. Ferguson and the time I got to my daughter's house I never did stop; when the passenger train came in from Lake Charles that night I had just got on the porch at her house; when I got on the porch I didn't see the train, I heard it coming in; that is the length of time that passed. I couldn't see the train as it came in from where I was, I just heard it, the buildings were between us, I couldn't see it until after it passed the depot. I don't think there was any whistle blown when the train came into the station that night, I didn't hear any. As to whether the bell rung, I couldn't say about that; I don't remember that I heard it, it might have rung and I wouldn't have noticed it, if it did I didn't notice it. As to the speed it was making that night, as compared with the speed it usually made when it came in, it was making faster speed. As [fol. 160] compared with the speed it usually made when it came in, I couldn't hardly tell that. As to how long after the passenger train came in it was before I heard about Mr. Ferguson being killed, I couldn't say about that, I had got back home just a few minutes. I never did go to the place where Mr. Ferguson was killed; I saw the place after it was covered up with dirt, they covered the blood up as quick as it was done, to hide it away from the people. I couldn't say the exact spot. With reference to the main Mr. Ferguson, it was right about the same location, the same general location, I couldn't tell in a few feet; I couldn't say the exact spot. With reference to the main line and the next track to the main line it was right between the two tracks.

Cross-examination:

As to my occupation, I have always been a millwright; I am not a railroad man. I have never had any experience in running trains, I never worked in the train service in my life. When I saw Mr. Ferguson on this particular night I was about forty feet I suppose; I was right east of him, I went between him and the depot as I went on. As to how far he was from the depot at that time it is down something like three blocks to the depot; I went to the depot and a block and a half further, I walked that three blocks to the depot, and then walked a block and a half to Mr. Haynie's house; Mr. Haynie is my son-in-law, his house is east of the depot. The depot at Leesville is on the left side of the track. When I got to the house I saw the light flash as the train came in there; about the time I got on the porch I heard it, it was below the depot, I don't remember hearing [fol. 161] the whistle. No, sir, I don't remember about the the bell, I wasn't thinking about it, just like you would have been. I wasn't expecting anything, or wasn't thinking about the whistle blowing, or the train. That is a big yard there, a yard of a little over a mile. A good many trains pass over there, some days a lot of trains pass there. A good deal of whistling about it, one train switching in there at the time. This train had a headlight; it came in that night about the usual time, I think it was on time, exactly. As to the space between those tracks down there about where I saw the blood, I think those tracks are six feet or more. I couldn't say exactly if they are eight or nine feet apart. I had it in my mind to measure that so I would know exactly, and I didn't do it. As to the space of level ground between the ends of the ties on the main line and the other, there is a walk-way between them; there isn't many folks chance walking there when the trains are passing, I know I don't; you could walk along there, trainmen walk along there; railroad employes.

Redirect examination:

With a train on the main line and one on the south track I haven't much idea about how much space would be between them, a person in there has got to pay attention to

their business if the trains are moving; of course, I have been caught in there a few times. Caught in there between two trains there would be enough space on either side to clear you; the other tracks is closer than that is, if a man was on the side of the other tracks and a box-car would run over there, it would knock him off and kill him. As to my judgment about the distance which would be between the two cars I couldn't say, I don't remember how they look in [fol. 162] there, I know they look very close, to look at them; I had it in my mind to measure that before I came over here so I could tell you exactly how it was and I didn't do it, I wanted to tell you if it was ten feet or two feet. The speed of the train as it came into the station that night attracted my attention to it; we heard it making such a racket at it come in that it attracted our attention. About the time I got to my sister's porch and stepped up, I heard it; I left there as quick as I could; when I went up there my wife had started with me, and that is the reason I was traveling like I was. As to what took place between the time I heard the train and the time it got in the station, I asked my daughter what it was, I thought it was an auto, and she said: "That's the Dude," and just then the light flashed in there; I am a mill-wright by occupation; I have filled that occupation twenty-five or thirty years; my work has been scattered over Louisiana and Texas. With reference to my work on the railroads, I have been on the Kansas City Southern and on the Santa Fe, on the main lines, I haven't been off from the main lines much; trains passing frequently; I have observed a great many trains passing in my life, I have seen and heard lots of trains.

Redirect examination (recalled by plaintiff):

I had known Mr. Ferguson a good long while; he was a sober man. As to whether he worked regularly or not, I haven't seen him when he was drinking; about his industry he was regular.

[fol. 163] Recross-examination:

I never knew of him to drink, but I have been with him a whole lot, and I never knew of him drinking."

Counsel for plaintiffs introduced in evidence the deposition of NICK FRANKLIN, taken at Port Arthur, Texas, on the 31st day of October, A. D. 1923, before J. A. R. Moseley, Jr., a Notary Public in and for Jefferson County, Texas, which is as follows:

"My name is Nick Franklin, and I reside at 337 Augusta Avenue, Port Arthur, Texas. I resided in Leesville, Louisiana, in February, 1922, and at that time my occupation was car inspector for the Kansas City Southern Railway Company. I am the same N. Franklin who testified at Boston, Texas, on the trial of the case concerning the death of D. R. Ferguson on or about the 12th day of February, 1922. I had inspected cars and trains for the Kansas City Southern Railway Company at Leesville, prior to February 12th, 1922—I had inspected cars and trains for the Kansas City Southern Railway at Leesville, for about ten years prior to February 12th, 1922—I had inspected for about three years at night, and seven years in the daytime, and I had also inspected four years before this time for the Kansas City Southern Railway Company at Hornbeck, Louisiana. Mr. D. R. Ferguson and I did not work together, and I can't say that I knew the practice of Ferguson, or others, with reference to the way they used their lights in making inspections of freight trains that were being made up in the [fol. 164] yard at Leesville, but I do know the way that the inspections are usually made. The first thing I did, as an inspector, was to inspect the draft rigging by shining the light under it. Then I always set the light down where it would shine on the coupling and in between the cars, and then couple the hose. I usually set it on the end of the ties. This is the usual way that I made a coupling and inspected it, and I would say that other inspectors must have done their work in practically the same manner, as this is about the only way that I know that the work could be done, and I would suppose that the manner in which the light, etc., was used would be the customary and usual practice of the inspectors engaged in inspecting cars or trains that were made up at night, for it is about the only way it could be done; an inspector would have to set the light down to make the coupling, for he has to use both hands—of course, I couldn't say exactly about how all other inspectors do their

work, but they all do it about the same way that I say I did—I had always used the light that way during my fourteen years of inspecting, but as I say, I could not say exactly about other inspectors, but I suppose they had been doing it in this way as long as they had been inspecting. I was familiar with the character of headlights in use on the road engines of the Kansas City Southern Railway Company at and about the time D. R. Ferguson was killed. If a road engine equipped with a headlight such as was in use on the road engines of the Kansas City Southern Railway Company at and about that time were to pass through a yard, and if a headlight should be burning bright, as out on the main lines between stations, it would have an effect on the ability of a person on or near the track to see or appreciate the approach of a train, the speed thereof, and [fol. 165] the distance thereof, a person could see a bright headlight, but he couldn't tell anything about the speed of the train or the distance that it was away from him. The use of a headlight such as used on the road engines of the Kansas City Southern Railway Company without dimming the same, if it is coming down the track you can't see anything but the headlight. If a fellow looks right straight at a headlight and it is kind of close, it will blind him and he couldn't tell the distance or speed then. You can't see nothing when they shine right in your face that way, and, of course, a fellow couldn't tell anything about the speed and distance of the train because he would be blinded. As to the habit and practice of an inspector who inspected trains that were being made up at night in the yards of the Kansas City Southern Railway at Leesville, on and prior to February 12, 1923, with reference to moving away from the opening between cars after coupling the car hose and inspecting the safety appliances, and the distance that they would move away from the car after having made said inspection, he would step back in the clear from the train that was being made up; I would say that he would ordinarily move back several feet, may be two, or three or four feet. A person making the inspection of a train that way, would move away from the standing cars about two, or three or four feet, step back in the clear several feet, that is, the practice and habit of the inspectors. With reference to the distance between the main line and the passing track

where Ferguson was killed that inspectors were in the habit of moving from the cars, in stepping away from them, the main track and the switch track are right there close together, and when the cars were on both tracks there wasn't but three or four feet between the cars, and when you stepped back from the switch after making an inspection, you would step back close to the main line.

[fol. 166] Cross-examination:

I don't know exactly how D. R. Ferguson inspected, as to the habits and practices in which he placed his light that was being used by him, but I just know the general way and custom that inspections are usually made. It is true that D. R. Ferguson worked on a different shift from the one on which I worked at Leesville. When I would make a coupling at night I would set my lantern down, but when inspecting, I always inspect with the light in my hand—I can't say how other inspectors do, exactly, but just know how the work is done ordinarily. It is true that I have seen trains coming into and going out of Leesville yards on or about the time D. R. Ferguson was killed, and I would think that a man would notice an approaching train with a bright headlight sooner and more easily than he would one with a dim headlight. I can't say that a fellow could tell the speed of a train or the distance it was away from him if he were in front of it, either with a dim light or a bright headlight, but a bright headlight would be noticed sooner by a man in front of it. Of course, when a train was a good piece off, a man couldn't tell anything about the distance or speed of the train whether it had a bright headlight or a dim headlight, but, of course, where a train was real close to a man he would be able to see more if it had a dim light than he would if it had a bright headlight, because he would be blinded by the bright light—this is true when the train gets pretty close to him. It is a fact that D. R. Ferguson and I, and all of the men working in the yards at Leesville, knew the time when the train came into that yard which is supposed to have struck and killed D. R. Ferguson. I [fol. 167] suppose a fellow could be safe, as a car inspector, inspecting cars on track No. one, in keeping out of the way of any train or engine being moved along the main line

track, but I never did like the idea of being in there between trains and would always move out of there when I knew that a train was coming. Of course, a man who is working in the yard is supposed to keep out of the way of a passing train."

The plaintiffs rest.

R. T. Hrsox, a witness for the defendant, after being duly sworn, testified as follows:

Direct examination:

My name is R. T. Henson. My business is that of a Civil Engineer, and I am in the service of the Kansas City Southern Railway Company. I am acquainted with the yard of the Kansas City Southern Railway Company at Leesville. I have a map showing the tracks in the yard there, and it is a correct map; as to the scale on which this map is drawn, one inch is equal to one hundred feet. The main line running through Leesville is running approximately north and south, we call it north and south, but it is not running due north and south, it runs a little east of north. The end to my left is the north end on this map, and this is the south end (indicating on map), and here is the depot, and here is the passing track here, all the way down, the first track to the east of the main line. As to where the switches begin to turn off with reference to [fol. 168] the depot, the yard lead switches is to the right, one goes to the round-house, and the other tracks—there are seven of them—and it is one thousand feet from the depot down to where the switch tracks proper begin to turn off—it is one thousand feet to the first one, that is the lead to the round-house, and the yard is eleven hundred feet, that is where the yard lead turns off. I can identify from this map where Mr. D. R. Ferguson's house is located, and also where the Standard Oil Company's place is—the Standard Oil Company's place is in Block Six of Lot twenty-one, or almost directly west of the Standard Oil Company's spur track—that is where its tanks and station is located, their buildings is approximately twelve hundred feet south of the depot, or four hundred yards. The scales

that are used for weighing cars are located five hundred feet south of the depot yard—I am giving you the center line of the passenger depot, and the length of the depot up and down the track is a hundred and sixty-five feet. The distance between the depot and Staples is 7,804 feet, or approximately a mile and a half—7,920 would be a mile and a half. The distance between the main line track and the passing track from center to center is fifteen feet, and from rail to rail it is ten feet—by "center to center," I mean the true center of the main line track to the true center of the passing track, or track No. one, that is fifteen feet, and between the rails is ten feet—the standard gauge is four feet. The height of the rail above a tie differs, the main line rail is approximately 5 7 32 of an inch, or approximately five and a quarter inches and the passing track rail is four and a quarter—that is a sixty pound rail. There would be approximately six feet clearance between two trains on those tracks, but I couldn't give you that exactly, because [fol. 169] the width of a box car would vary a little, but approximately six feet. There would be no difference in that distance between standing cars and running cars, because the track is level, absolutely level, a straight track. The section house ground shown on this map is forty-seven hundred feet below the depot, or something like nine-tenths of a mile. I was acquainted with that yard in 1922. The ties were laid on top of the ground on those tracks—it is ballast, we have some gravel ballast between the ground and the ties.

Q. But between the tracks are they laid down level with the other, or is it lower?

A. It is lower between them, and the passing track is lower than the main line, the main line is always higher. That distance between the tracks there is one foot greater, as I understand, than the standard width between tracks, the standard is fourteen feet from center to center, and I think it is about the same thing with reference to railroads generally, I think they are all about the same, fourteen feet from center to center. The yard is all east of the main line at Leesville, and the switch tracks are all east of it, there is no track or anything west of the main line except the house track, which has no bearing on the yard, the house track breaks out about a hundred and

thirty feet south of the lead. I have been informed about where this accident to Mr. Ferguson occurred, I was on the ground the next morning after the accident: the accident occurred near the Standard Oil Company's spur, sixteen hundred feet south of the depot, and eleven hundred feet from the scales are located, which would be three hundred yards and two hundred feet. Mr. Ferguson's home is located in the same block with the Standard Oil Company; only back of it, or west of it. Mr. Ferguson was [fol. 170] killed three hundred feet south and about two hundred feet east of the Standard Oil Company's place.

Cross-examination:

Each of these lines represent a track. There are seven tracks and the main line, altogether. Those tracks are used for making up freight trains principally, and storage of the cars that are in there, for storing cars of all kinds, and general freight use; the freight trains that are made up are made up on these tracks east of the main line, on any track east of the main line that happens to be available. Part of the measurements for this map were taken the morning following the accident—in fact, most of them were, but I went back later after taking the field notes and coming to the office, I don't know just how long it was, but it was sometime afterwards, possibly thirty days. There has been no change in the yards whatever. The main line there was ballasted with gravel, and we have cinders under the side track. The cross ties are above the ballast, we dress it up level with the tie inside of the rail, but from the end of the tie, it slopes off from the end, we dress the tie and the ballast and the tie is practically level in the center. There is not a kind of basin or drain in between the track; the ballast slopes from the end of the tie to about—well, it depends upon about how much ballast you have, but in that case the toe of the ballast would be about a foot or possibly eighteen inches from the tie. I would say that the depth of the ballast right there would be possibly three or four inches, below the tie, and then the thickness of the tie may be either six or seven inches; at that time the ballast was approximately four inches below that, we have put another coat on since then. The ground between the main line after you get out to the end of the ballast

[fol. 171] and the side track, the ground there was lower than the main line and lower than the center of the side-track, it had a kind of basin in there, you have that in all tracks.

Redirect examination:

There was no scooped out place in between those tracks, it was level, if it was scooped out it would hold water, and we make every effort to keep the water out of there.

Recross examination:

The water that accumulates between those two tracks does not stay there, the yard is on such a grade as that the water runs away, and in stepping from the main line toward the side track you step down hill, and in stepping from the side track toward the main line you step down hill slightly, because between the rails or in the middle of the track is bound to be higher than on the outside, so that the water won't stand in between the rails of the tracks proper.

Counsel for defendant introduced in evidence the testimony of Dr. F. P. Jones, given on the former trial of this case, which is as follows:

Dr. F. P. Jones, a witness for the defendant, after being duly sworn, testified as follows:

[fol. 172] "Direct examination:

My name is F. P. Jones. I am a physician and surgeon. I am a graduate of Atlanta Georgia Medical School. I reside at Leesville, Louisiana, and have lived there twenty-five years; I have practiced my profession in the Parish for twenty-eight years, I believe. I knew D. R. Ferguson in his lifetime. I remember the circumstance of his being struck and killed in the yards at Leesville on February 12th, 1922, I made an examination of his body after he was killed, but I don't remember the exact date; it was the same day that he was killed, a few minutes after he was killed when I saw him. His right arm was broken about at the

junction of the middle and upper third, about two thirds of the way towards the shoulder joint, it is the junction of the middle and upper third of the humerus; he also had the fifth and sixth ribs broken, and he had a large cut in his side just almost exactly in the axillary line, right along there (indicating), about an inch and a half or two inches below the arm pit, I will say, and extended from there down below the arm pit on the right side, you could put your hand in the gash; his skull was mashed, the back of his head on the right side, and he had a little cut I believe on his right cheek, I believe somewhere right along there (indicating), that is all that I remember about the wounds. I presume Mr. Ferguson was about five feet eight and one-half inches, possibly nine inches, he wasn't as tall as myself, I am six feet. I knew Mr. Ferguson quite well and had known him for thirty years.

[fol. 173] Cross-examination:

The wound in the side was just a hole knocked in the side, two or three ribs fractured, and there was a hole there that you could stick your hand in, I did do it, to see how large it was, and the back of the skull was fractured pretty far back. I observed the ground where the body lay, I helped to pick him up, and close to where he was lying it looked like he had hit the ground there and slided a little farther towards the depot, as if he had been knocked against the ground and went a little further.

L. Polete, a witness for the defendant, after being first duly sworn, testified as follows:

Direct examination:

My name is L. Polete. I live at Shreveport, Louisiana, and have been living there about twenty years, I guess. I am a locomotive engineer, and have been for twenty-six years, all told. I was in the employ of the Kansas City Southern Railway Company in February, 1922, as an engineer, pulling a passenger train, running from Lake Charles to Shreveport. The train had just been put on as a new train and I had been pulling it since it had been put

on the road. To the best of my recollection that train had been put on three or four weeks prior to Mr. Ferguson's death, but I don't know exactly, that has been a long time ago. I had been pulling other trains over that track before this particular one. This train that I was pulling at that [fol. 174] time ran through Leesville, Louisiana. The number of the engine that I was pulling at that time was 601. I first heard that Mr. Ferguson had been killed when I got to Many, that is about thirty-six miles above Leesville. 7:05 p. m. was the schedule time for me to arrive at Leesville. That was a north bound train. Staples is a station one mile south of Leesville, and the schedule time for me to arrive at Staples was 7:01 p. m. My train was on time that night, and we arrived at Staples on time, and just made the usual stop there, not to exceed over twenty or thirty seconds, to the best of my recollection, because traffic was light, and that was a small place. After I got my train started I ran about twenty to twenty-two miles an hour from there to Leesville, and I arrived at Leesville on time. I sounded the whistle that night between Staples and Leesville—when I left Staples—there is a road crossing just north of the town of Staples, between Staples and Leesville, and I blowed the road crossing whistle at that point, and when I got on out at the usual blowing place for the Leesville depot I sounded the whistle there, for the station, that is, the station whistle. We have a regular place that I sound the whistle for the station there, going into Leesville—I have one place there that I don't vary but very little from, and that is about a quarter of a mile from the depot; I sounded the whistle there that night. The bell on that engine was rung in passing through that yard that night, we have an automatic bell ringer, and the fireman operates it and I do the whistling. You just start ringing those automatic bell ringers and they keep ringing until you shut them off. I had a headlight on my engine in going through Leesville that night, and I consider it a number one headlight; it was in good condition. It had an arrangement for dimming or cutting out the headlight, we had a [fol. 175] device there for cutting the main headlight out and lighting the dimmer; it had a small light. I did not cut out my light or dim it in any way in going through the yards, I had a bright burning light. It is not the custom

on the Kansas City Southern to dim it, and I didn't dim when I was going in on the main line to any station, it was customary to keep it bright, and the rules were that we should have a headlight going through all stations and on all parts of the road. I could see an object better with it that way, by having it bright—if anybody was to get in a dangerous position I could see them better. In approaching and going through that yard I was keeping a look-out; I kept a look-out in the yards and also along the lines that I travel on. I did not see Mr. Ferguson or any other man on or near the track in going through those yards that night. I did see a lantern in the yard there at Leesville, I saw a car repairer's lamp sitting on the ground between the tracks, between the main track and track No. one, supposed to be the passing track, but I did not see Mr. Ferguson or any other man there about the lantern, no man about this light whatever. This headlight is some distance up above the ground, but I don't know how high it is above the ground.

Q. Now, I will ask you if you are in your cab, if that light goes ahead and leaves any dark space between the cow-catcher and out some distance on the track?

A. Well, this light I had this night gives a perfect light from the point of the pilot to as far as the vision of the light would go. The view of the engineer is not cut off in any degree if he is back in the cab—for instance, the engineer sitting up in the cab can see the ground right at the end of the pilot, I can see the ground within a few feet of [fol. 176] the end of the pilot—you understand that this light hits the ground as a rule about twenty feet ahead of the pilot, and from there on as far as the light will shine it is perfectly bright, but now from where it hits the ground within—we will say twenty feet of the pilot, there is, well, a light shadow from that mark back to where I set in the cab where I can't see the ground. I did not know anything about striking Mr. Ferguson at all, and I don't know in fact whether I struck him or not, but I got a telegram at Many, about thirty-six miles above Leesville that he was killed, and I made an examination then of my engine, and I found on the step of the pilot on the right hand side about three or four drops of blood, it looked to me that it was

old dry blood, very dark, and there was one spot on the pilot beam—it was also an old dry spot of blood, a very small drop. The pilot beam is what the pilot is bolted onto. The pilot and what you call the cow-catcher is all the same thing, I call it the pilot, and that is attached to a beam that runs across the front end of the engine.

Cross-examination:

I judge that pilot beam is something about three and a half feet above the track, and the beam is about ten or twelve inches thick. The beam extends out just about in line with the end of the ties. I don't know the exact length of the beam, but I judge them to be about eight feet in length, and it extends out in front of the cylinder of the engine, but not out to the side of it—it is about in line with the cylinder. The light on the engine that night shone out right down in front of my pilot, within a few feet, something like twenty or thirty feet, and it gave a reflected light back as far as my seat in the cab—from where the light hit the ground in front of the pilot there is a light place there that you can see clear back to where I set in [fol. 177] the cab. My headlight was a very bright headlight, I had a good bright headlight, such as comes up to the standard safety appliance equipment, I think it would. I don't know whether it is just about three times as bright as the head light that is used on switch engines in the yards in switching or not, as far as I know, we have got just about a standard light on all the engines. I have never observed the switch engine lights very close, because I don't work with them kind of engines of course. I have not examined the Interstate Commerce rules and regulations with reference to switch engines. For instance, I wanted to change my headlight and didn't want to burn it as bright as I am burning it, we have a post and lever in the cab just over my head, and I can change it with just my thumb and finger—I can turn off the main light and then light the dimmer, which is a small condensing light, about a thirty-two candle power light—and some sixteen, and it sets inside of the headlight. That would not fully serve the purpose of a headlight—that sixteen or thirty-two candle power doesn't throw a light near to what the big light would, not anything

like half as far; I think the big headlight is a five hundred candle power light, but I ain't right sure about that; it is not an arc-light, it is a globe light, but a big light, a good strong light. I don't know whether we have any two hundred candle power lights or not. We have a five hundred candle power light that we use out on the road, and then a sixteen or thirty-two candle power light that I call a dimmer, and those are the only two lights that I have on my engine. This train was referred to as an extra, though in fact it was a regular train, but it had not been put on the regular time card, and that is the reason it was called an extra. I am not sure how long it had been running, [fol. 178] but to the best of my recollection it was three or four weeks. I was running at a speed of twenty or twenty-two miles an hour between Staples and the depot up to Leesville—to about where the accident occurred, and just about the same speed before I got to where the accident occurred, until I commenced reducing to make my station stop, which was somewhere after the accident. To the best of my recollection we didn't consume over thirty seconds time at Staples that night, half a minute of actual stopping time. If I had three or four or five passengers to let on or off of course it might have been a little more than that, but if I had only one of course it would be less, but I feel quite certain that I went into Leesville on time. It is customary for me to blow my whistle about a quarter of a mile south of Leesville, that is, from the depot, and it was customary for me to ring the bell as I went through the yards and into the station at Leesville; in others words, the bell would start ringing at the south end of the yards and on into Leesville station, that was customary; our rules required the bell to be rung along in that place, that is why it rang along there. Leesville was a freight division point, freight trains were made up and broke up there, and freight crews run out of Leesville both north and south; they made up their own trains in the yards there at Leesville, and they made them up at night. I don't know whether they had three shifts of car inspectors there or not, I don't know how many shifts the car inspectors had, but they had car inspectors day and night. I knew that they had car inspectors to make up the trains there. As

I went into Leesville I saw a lantern between the two tracks, I passed by that; it was facing south, at about a forty-five degree angle—it wasn't facing direct—it was facing southeast, at about a forty-five degree angle, which give me a good light, and I could see that there was a light there. [fol. 179] There were a string of freight cars and box cars east of that light. That was a track on which they frequently made up trains. They don't usually use that track to store freight cars, they used it as a passing track and to make up trains on. It was necessary to ring the bell as I went through Leesville to give warning to any people who might be working in the yard, that was the purpose of ringing the bell, so as to sharply attract the attention of the people that might be there and let them know that the train was coming, that was the idea. I blew the whistle as I went into those yards because it was a part of my duty, and it would have been wrong not to have blown it, and a violation not to do it. That blast of the whistle was just one long blast, and it would attract the attention of anybody within half a mile of it that the train was there. As I went from Staples to Leesville I did not see anybody on the track or close to the track in front of me between Staples and Leesville. It was my duty in going into Leesville to keep a look-out in front of my train for any obstruction that might be on the track, or anything of that kind, and if there were any persons on or about the track it was my duty to blow the whistle and warn them that they were in danger. A car inspector is the man that examines all the safety appliances and devices and brakes and brake-shoes, and the air and air hose and all those kind of things on the train to see that the running-gear is all in first class shape before letting the train start out, and on his say-so the train goes out or stays in, that is, if it is all right the train goes out, he has authority to bad order any car and take it out, and if it has some light repair that he can make he repairs it, and if it is something that he can't repair himself he has it set out of the train; that is for the safety in the operation of the train. I am required to keep [fol. 180] my train under control in going through yards, and through the yard at Leesville.

Redirect examination:

I was not running that train through the yard at Leesville that night any faster than I usually ran it, I was running it at just about the customary rate of speed. This matter was all called to my attention right after the accident, and I made a statement about it right after the accident occurred. The matter was called to my attention and I made a statement about it while the whole transaction was absolutely fresh in my memory. I did not stop at Staples that night any longer than the usual stop there, to the very best of my judgment and recollection. I went on through the yard, and I whistled at the road crossing before that, and then I whistled as I went into the yard, and the bell was ringing on the engine as I went through it, and I was keeping this look-out ahead, but I saw no person about or near there. The round house force looks after those headlights and puts them on. I have nothing to do with putting the lights on and making the repairs, all that I do is to know that I have got a light when I start out. I have a lever by which I can increase this light, make it greater or less, the lever in the cab, you can cut the bright light entirely out and at the same time light a dim light in the headlight, called a dimmer, making a dim light. In going into stations it was customary on the Kansas City Southern for me to have my headlight burning bright so I could see. That night I could have seen the size of a man at least fifteen hundred feet ahead of me by this headlight that I had on that engine.

[fol. 181] Recross-examination:

If I had had that dimmer on, to the best of my judgment, I don't believe I could have seen a man over a hundred or a hundred and fifty feet at the very best, with the dim light on. Of course I go out of stations on the signals of the conductor; if he has a lot of baggage and passengers to handle that delays me.

W. R. Proud, a witness for the defendant, after being first duly sworn, testified as follows:

Direct examination:

My name is W. R. Proud. I live at Shreveport, Louisiana. I am a passenger conductor on the Kansas City Southern, and I was the conductor on the train that came into Leesville on the night of February 12th, 1922, that is supposed to have struck and killed Mr. Ferguson. That train run between Lake Charles and Shreveport. I could not say how long it had been running between Lake Charles and Shreveport before the 12th of February, it had been running some time. I don't know exactly how long it had been running before it was put on the time card; it had been running perhaps thirty or sixty days before February 12th. I remember that the train that night reached Leesville on time, and 7:05 p. m. was the schedule time for it to reach there; it was also on time when I reached Staples, and we just barely made a stop at Staples that night, we were there perhaps thirty or forty seconds. It is a mile or a little more from Staples to Leesville, about that. It is [fol. 182] a perfectly straight and level track between Staples and Leesville. The train did not run at an unusual rate of speed that night between Staples and Leesville, it made the schedule time. I heard the train whistle that night between Staples and Leesville, he whistled for the road crossing just north of the station, and then he whistled for the station at Leesville. With reference to it being my duty to get up and do anything when the train approaches a station, I generally pay attention to all signals, as a usual thing it comes to us very quickly—when the engineer blows we know what he blows for. The bell on that engine was ringing that night leaving Staples, and the crossing being just beyond Staples I am certain it was ringing there, but at the same time I couldn't be positive about that, but it was ringing going into Leesville, I could hear that. I could hear the sound of the bell between those cars—I had just started out on the platform of the cars; that was before I got to the station.

Cross-examination:

The idea of ringing the bell as the train went into Leesville was to warn people, the bell must be rung at all times passing through stations in order to warn people of the danger in coming.

Q. Well those cars were down there a thousand feet from the station in the yard, what was the idea of ringing the bell passing through the yard?

A. The bell was ringing constantly leaving Staples and this crossing to warn people to get off the track. I don't mean that we would be expecting people perhaps to be on and about the track in that territory—we wasn't expecting it perhaps, but in case they were it would be a warning for [fol. 183] them to get off the track—that is the reason the bell is rung, warning people in the yards. Freight trains are made up there going both ways, and the car inspectors inspect the cars. I never worked as a car inspector; I have worked in the freight department, and I know in a general way how that is done. We make up trains on that track next to the main line, on several tracks, and sometimes on that track. I knew it was the car inspector's duty to inspect the trains as they were made up. In inspecting a train at night the car inspector would use his lantern to examine the safety appliance. The car inspector couples up the air hose, and he would have to go between the cars to do that. I can't answer the question as to whether he would ordinarily not take his lantern in between the cars. He would have to use both hands, but sometimes they do it in the dark; he would have to use both hands to couple the hose. As to it being the natural and customary thing for him to do instepping back out after he has coupled them, he might turn around and walk out, or he might back out, but as to whether he would step one step away from the cars or five steps away, I couldn't very well tell how far he would step, but he would step to the outside rail and raise up; and in going on about his work he would probably get his lantern and go on to the next place. There is no fixed rule as to how far he would get from the cars as he was doing his work—in the nature of things there would not be. The idea of keeping the bell ringing was to apprise car inspectors and everybody else in the yards

that a train was going through the yard, that the train was approaching—in other words, it is a separate and distinct noise from the noise of the train, and you can hear the bell above all that, it is a distinct noise of itself and is a warning of the presence of the train.

[fol. 184] Redirect examination:

I am not a car inspector and never have been, I only work 'tending to my duty and making up my train. An inspector wouldn't have to back out from between the cars any further than just to raise up, he wouldn't have to step out five feet, because it wouldn't be necessary until he could raise up and walk right along side of the car.

A. S. Cox, a witness for the defendant, after being duly sworn, testified as follows:

Direct examination:

My name is A. S. Cox. I live at Leesville, Louisiana. I am a locomotive fireman in the service of the Kansas City Southern, and have been a locomotive fireman for thirteen years. I was fireman on what is called the "Plug" or extra train that ran into Leesville on the night of February 12th, 1922, the night that Mr. D. R. Ferguson was killed. That train was called an extra then because it had not been listed on the time card, but I don't know how long it had been running as an extra before this accident, I couldn't answer that question. I believe I was fireman ever since it had been running. I remember the facts about coming into Leesville that night. The train reached Leesville and Staples on time that night. The schedule time for it to reach Staples was at 7:01 p. m. That train made about the regular stop at Staples that night, about thirty or forty seconds, something like that. Staples [fol. 185] is a very small place. I can't say whether many passengers usually get on or off there in coming north or not, I can't say as to that. I stay on the left hand side of the engine, and the engineer stays on the right hand side. The track is straight all the way from Staples to Leesville. I know that the engineer blew the whistle on this particular

night as he went into Staples, he blew the whistle for Staples, and after he left he blew for the road crossing, and then he blew for the station at Leesville. It is my duty, and was at that time, to ring the bell on that locomotive. I had an air bell ringer, which is a little cylinder coupled up with levers, with a little valve coupled onto that, that lets the air into these cylinders and that lets the lever work backward and forward; that bell on that engine was ringing as we went through the yards at Leesville that night. I was keeping a watch ahead in going through the yards at Leesville that night, but I did not see any man on the tracks or near the tracks as we were passing through the yard. The headlight was giving a good light so that I could see along the track, and I saw no man on or near the track as I went through the yard there. I saw a lantern as I went through the yard there, between the main line and the passing track. I did not know anything of this accident until I got to Many.

Cross-examination:

I inspected the engine at Many to see if I had any signs of having struck anything, and I found evidence of blood on the right hand side of the pilot beam. I am the man that testified to that. I remember that the whistle was blown at the crossing north of Staples because it is an [fol. 186] every day occurrence, and I remember that it was blown for the station for the same reason. I remember that the bell was being rung that night because I was ringing it myself. I didn't do anything more than turn the air on, that was my duty, and I would be doing wrong if I didn't do it. I was doing it because it was customary, and for the safety of the public—that is the reason I remember that it was ringing. I knew that they made up freight trains there in the yard both day and night, and I knew that it was necessary to ring the bell as I went in there to warn the brakeman or car repairers and car inspectors, or whoever might be near the main line, to enable them to avoid getting hurt. I was about beween a quarter and a half a mile from this inspector's light when I first saw it. The engineer could see it about as far as I could, one could see it as far as the other. I went right on by it and into the station and did not see anybody. I

saw some cars there on the railroad track east of the light, they were on the next track east of my track. I never worked as a car inspector. I do not recall where that light was with reference to the north end of that string of freight cars, I have no idea, I just know it was somewhere along the cars. I don't know whether it was at the opening between the cars where they are coupled together, or along side of the cars. The light was not facing us exactly, it was facing toward the passing track, but I could see the side of it, and my idea was that it was facing those cars on the sidetrack, that is the way it impressed me.

Redirect examination:

This train was not running any faster through the yard that night than it usually ran through there. My atten- [fol. 187] tion was called to this transaction soon after this accident occurred, and I was requested to make a statement about it for the railroad company. It is customary when anybody knows anything about it to make a statement, and I made that statement right then, while it was all fresh in my memory. I know, as a positive fact that the bell was ringing that night, and the whistle being blown, I know that.

T. H. Burke, a witness for the defendant, after being duly sworn, testified as follows:

Direct examination:

My name is T. H. Burke. I live at Leesville, Louisiana. I am a freight conductor for the Kansas City Southern Railway Company; I was employed on the Kansas City Southern Railway on the 12th of February, 1922; I knew D. R. Ferguson in his life time. I was in Leesville on the night that Mr. Ferguson was killed, but I don't remember the day of the week, I don't remember whether it was on Sunday or not, I couldn't say, but it was on the 12th of February. I was called to go to work that day about 5:45, the best I can remember, I was called to make up a train in the yard to go North, a freight train. By making up a train, is meant that you would go in the yard and pick out

such cars as went the way that you were going, switch them together, and weigh them that were to be weighed, that is, up until you had a tonnage train, get sufficient cars to make your tonnage. We would assemble our cars on [fol. 188] track No. 1, and we were assembling these cars on that track that night, all that wasn't to be weighed. We put some cars on Track No. 1, or this passing track, that night. That track is located just east of the main line, the first track east of the main line, and parallel with the main line. I was up at the scale track weighing all the cars that came in at the time that this passenger train known as the "Plug" or extra came in that night, and the engine handling the cars going out of my track was right about opposite the depot at that time; at the time this passenger train came in my engine was moving occasionally shoving a car. The engine would just move a car length on those occasions, weighing a car at the time, between thirty-five and forty feet at the time, and it was up opposite the depot, or east of the depot at the time this passenger train came in and was weighing some of these cars on the scales. I met Mr. Ferguson after I went on duty that night, or that evening—I first saw Mr. Ferguson as I was going down in the yard, checking up the cars that I was to take with me, I was going down track known as No. Nine cut-off track, used to store cabooses on when I first saw him. That must have been between five and 5:45, but I don't know just exactly what time it was before the crew had been called—I don't know just what time it was before the crew went to work that we had been called, but I hadn't gone to work yet, I was just going down to locate my cars, and Mr. Ferguson came out of the yard and started to cross this No. Nine cut-off track, that is where I first saw him, and he asked me if I was called, and I told him yes, and he made some other remarks that wouldn't be necessary to tell I [fol. 189] don't guess. At that time he was in my judgment very much intoxicated. I knew him pretty well, I had known him for about five years, I suppose; he was a man that was addicted to the use of drink for the past year, before he got killed, and he got under the influence of it pretty often, I saw him on several occasions when he was pretty full. I did not see Mr. Ferguson any more after that, I told him to go away and keep out of the way, for

fear he might get killed, I told him to go and stay out of the way, and he bawled me out and told me that he was capable of tending to his own business, and I did not see him any more that night. I thought that he went off of the yards that night, he started towards the carmen's shanty, the place where the inspectors stay, off down that way, but I don't know as to whether he ever got there or not. After I saw Mr. Ferguson, I put some cars on this passing track, I put all of them that I ever put in there on the track after that time. The best I can remember we had been away from there about twenty or twenty-five minutes when the plug came in that night—we must have left down there to go away, I suppose, about 6:40. I did not go to the scene where Mr. Ferguson was killed after he was killed, I did not go there. I heard this train coming into Leesville that night, and I heard it whistle for the station at Leesville; I also heard it when it whistled for the station at Staples, south of Leesville. As to whether or not the bell was ringing as it passed through the yards, I know that the bell was ringing on it when it passed me, just south of the depot, but I don't know whether it was ringing all the way through the yards or not. I had seen that train come in there often before that time, and I did not notice anything out of the ordinary in reference to the speed at [fol. 190] which it was running that night, nothing other than the usual speed. It was right about on time that night, I think it was due there at 7:05. No other train was being made up in the yard there that night, other than the one I had charge of.

Cross-examination:

This car foreman's office, or shanty that I spoke of is between the round house—that is, the shops and the depot, on what we call the round house lead—a rip track also goes down there, and it is located on the repair track some four hundred yards from the depot. That is a little further south than I made up my train. We had three shifts in the yard there. They didn't have any foreman at night, but we did over the rip track force during the day. Mr. Ferguson was working at night, he was a night inspector, and it was his duty to inspect my train. I was opposite the

scales that night when this train came in, and the bell on it was ringing when it passed me. I checked the cars up to where they were weighing and crossed over on the opposite side of the main line and the passenger train came by. It is the customary rules of the Company in approaching depots and road crossings to ring the bell, and in running through the yards they ring the bell so as to warn the workmen that is working there, or anyone else that might be near the track. I haven't been living there at Leesville but twelve months, but I have been working in and out of there ever since it has been a terminal. I was working in and out of there at the time Mr. Ferguson was killed; I had been working in and out of there since 1912. I came in contact with Mr. Ferguson on every shift that he [fol. 191] was working. Mr. Ferguson had been drinking very heavily while on duty for the last twelve months before he was killed. As to whether or not I am a drinking man, I have drank quite a bit, but I wasn't a drinking man then. As a conductor, I took freight trains out on the road where they were running four passenger trains daily at that time that a drunk man had inspected, on a road where they were running two passenger trains each way until this "Plug" went on, that made six trains a day. My engineer and fireman and brakeman also worked on those trains too.

Q. And the failure of your inspector's duty might cause at any time a wreck?

A. Well, any time I make up a train if the brakeman don't go over it I do myself, I don't care who the inspector is. If the inspector didn't go over my train and properly inspect it, it might cause a wreck at any time, but I don't know whether it might kill me and my whole crew or not, I don't know that it would endanger us—some places we don't have an inspector. The purpose of having inspectors is to uncouple the hose and bad order cars and turn trains out of the terminal. The Company was not in the habit of working intoxicated men if they knew it. I couldn't say that Mr. Ferguson drank on duty practically every day for a year, but I had seen him that way. I did not make any effort to get anybody to inspect my train that night; I told Mr. Ferguson to go on and we would look out for it ourselves. I was going out without my train

being inspected. I was going to take my train out on the road without it being properly inspected by a competent inspector, I have done it many a time, out of that same place.

Q. Didn't you know you were violating the law of the National Government when you did?

[fol. 192] A. Well, I have done it many a time. I was not going to complain about the inspector being drunk, I couldn't afford to, he was a man of family. I guess there is only one man more important tha/ the inspector, and that is the dispatcher, the man that handles the telegraph keys, that is more important to the handling of the trains and the safety of the public, I guess that is right, but notwithstanding that, we let him stay there.

Redirect examination:

I expected to look over the train myself, and I told this old man that I would do that,—I told him that we would do that, and for him to keep out of the way. I inspect them while out on the road, it is a part of our duty to inspect them at each stop. With my experience I believe I am capable of finding out if there is anything wrong. I have never had any accidents to lead me to believe that I wasn't capable of finding out anything. I have been a conductor about seven years, and was a brakeman, all told about eighteen years. I have also been a car inspector. Other trains run out of Leesville besides mine, I wasn't the only man running a train out of there. We had a good headlight on my train, a regular road engine, and in switching there in the yard we used the regular road light.

L. R. Adams, A witness for the defendant, after being first duly sworn, testified as follows:

[fol. 193] Direct examination:

My name is L. R. Adams. I live at Leesville, Louisiana, and have lived there a little over five years. I was raised in Fulton, Kentucky. My occupation is that of warehouseman there at Leesville, in the employ of the Kansas City South-

ern Railway Company. I knew D. R. Ferguson in his life time. I guess I knew him for about four years prior to the time he was killed—I met him before I was out here this last time—I met him when I came out here on a visit one time. I remember the circumstance of Mr. Ferguson being killed there in the yard at Leesville that night, but I don't remember the date. I saw him the same night that he was killed, about fifteen or twenty minutes before the train hit him, I guess. I saw him in the yard down there. There is an old tool box down there that we have to keep tools in, and this box slopes on the front side and Mr. Ferguson had his feet on the ground and was kind of leaning on this sloping part, kind of setting there and leaning there. I know where the main line is there. I am not sure about where the passing track is, but I believe it is between track No. Three and Four—there is one track missing, the tracks don't run in rotation, there is one track out that is not numbered, and it is between those tracks where this box was setting. That was on the west side of the passing track and also on the west side of the main line—the box might have been between the passing track and the main line—there is two tracks there and it was between two of them, but I don't remember which two it is between. Mr. Ferguson was intoxicated when I saw him there at that time, to the extent that he was so he couldn't talk, his tongue was all thick, and he couldn't [fol. 194] talk like he ought to, and I asked him to go out to the house and he wouldn't do it—Mr. Ferguson was a man that when he was drinking that way he wouldn't do anything you told him to. After I saw him there I went to town to see if I could see Mr. Franklin anywhere. He was a car knocker or car inspector there, and I went down to town looking for him; before I went to look for him I went to Miss Ona Ferguson's house. I had not seen the old man at any time before I saw him down there at that box. After I saw him there at this box in that condition, I went across to his house to tell Miss Ona about it, because I was afraid may be he would get hurt in that condition, and I told her about it and she asked me to go and look for Mr. Franklin. I first told her so she could get him off and may be keep him from getting hurt, and then she asked me to see if I could find Mr. Franklin and see if he would

relieve him, and I went for her to see if I could find Mr. Franklin. I couldn't say whether I heard this passenger train come in that night or not, I don't remember. I went to the scene where Mr. Franklin had been killed after that, but I don't remember whether I saw his lantern anywhere around there or not.

Cross-examination:

I lived at Leesville at the time, and was living on the northeast side of the track there. I work at the depot, and at that time I believe I was working from seven o'clock in the morning, until four in the evening. I don't know whether I worked that day or not, I don't remember what day that was, if it was Sunday I did not work, but if it was any other day I was working. I cannot now remember whether I worked that day or not. I can't say for sure [fol. 195] where that tool box is with reference to the main line of the railroad in the yards there, but it is west of the main line. I don't know how many tracks there are west of the main line, but I think there is about nine, but I don't know, because I don't have anything to do with the yard; my recollection is that there is about nine tracks there, and I think they are all west of the main line. I don't know just how far south of the depot this box was, but I guess it was something about two or three hundred yards. It was way down below the scales, it was way down below the switches down there, just about as far down as the Standard Oil Company's House, just about that distance. I don't remember whether there were any freight cars around there where Mr. Ferguson was or not, I couldn't say, I have no recollection of seeing any. As to what I was doing that night, my understanding was that Mr. Franklin worked that night, and when I first came there he was a good friend of mine, and I would go down and set around and talk, and I was going down there that night to hunt Franklin, but I found Mr. Ferguson. That was just about fifteen or twenty minutes before that train came in, but I don't know what time it was. When I left there I went to Miss Ferguson's, but I couldn't say whether it was dark or not. I went over and talked with Miss Ferguson, and I believe Miss Ona was there, and that little boy, the least one. Miss Ona was in the house, but I don't remember what part of the house

she came out of, she was in that little hallway. I don't remember whether she was in the kitchen when she talked to me or not. Mr. Carlisle was not there, or any other gentle- [fol. 196] man. I had a talk with Miss Ona. As well as I remember, the place where I saw Mr. Ferguson was just above even with her house. I did not stay there but just a few minutes, and then I went to town, and when I got to town I went to the lodge room and couldn't get in, I thought maybe Mr. Franklin was up there. The train had not come in then. I could not say where I was when the passenger train came in, because I was up town when it came, and on my way back some boys passed me and asked me if I had heard about the man getting killed, and I told them no, and asked who it was, and they said it was Mr. Ferguson. I had known Mr. Ferguson for several years. I knew he was working there in the yards, and I knew he had been getting drunk, I had seen him drunk several times; he was a man that if you tried to get him to do anything when he is drunk, he gets mad. I cannot remember how many times I saw him drunk, six or seven times I guess, about once every month, I guess. I don't remember where I saw him drunk on the other occasions, sometimes at the house and sometimes at other places, I saw him one time at his house—I used to go down there. I used to drink, but I did not drink with him that day—I have drank with him. I don't buy moonshine whiskey, Mr. Ferguson bought the whiskey. That is the only place I can remember as to where I saw him drunk, I have seen him lots of times drunk, but I can't remember now where it was. I never did tell the railroad people that I saw him down there in the yard drunk that night, and I don't remember the date that they first learned that I saw him down there. Some of them talked with me at some time and found out that I knew about it, but I [fol. 197] don't remember the date—I don't remember the date that Mr. Ferguson was killed, but at the time they talked with me about this was several months after that. I don't recall now who was the first one that talked with me about it, two or three talked to me about it, but never talked to me but one time in the warehouse down there, the railroad people looking up the case for the railroad company, I told them about him being drunk, told them that he was drinking when I saw him down there that night. That

is the first time I had ever told about seeing him drunk. I did not tell about seeing him drunk while he was alive. I knew that he was a car inspector and I knew that was a very important position there.

Q. And yet you knew they had a drunken car inspector and had known it for months, and yet you didn't tell the railroad people anything about it while he was alive, and after he was dead and this controversy came up between them and his children, then you did tell them about it?

A. Well, they asked me and I told them. I don't remember whether I testified that I saw Mr. Ferguson down there at the tool box at a quarter till six o'clock or not, that is a long time to remember, three years, and I don't remember exactly how I stated it when I testified before, but I am telling it this time just like I can remember it, like I saw it. I won't say that I did not testify that it was six o'clock, I won't be sure, I might have and I might not.

Redirect examination:

I didn't voluntarily tell this even to the railroad, they asked me about it and I told them just what I knew about [fol. 198] it, just what I saw. If that track is running north and south the depot is on the east side of the main line. I may have myself tu*r*ned around. Coming from Staples up to Leesville those houses are on the right hand side—I may be wrong, but the depot going south is on the right hand side and the tracks are on the left hand side. If I was facing—I just got it mixed up.

Recross-examination:

That is all that I got mixed up. I testified here freely that all those tracks were on the west side of the main line, the best I knew, but I was just mistaken, they are not on the west side, my testimony to that extent was not true.

J. R. Peace, a witness for the defendant, after being duly sworn, testified as follows:

Direct examination:

My name is J. R. Peace. I live at Leesville, at Louisiana, and am in the grocery business there. I have been a

grocery merchant at Leesville, about four years. I knew D. R. Ferguson in his life time, he traded with me. I remember the night that he was killed in the yard down there at Leesville. I had seen him that day; I first saw him up at the store at about two-thirty or three o'clock, I guess, something like that time, but I don't know just exactly. He had been drinking when I saw him; when he was there at the store I smelled whiskey on his breath. He was a [fol. 199] man that drank. I saw him some more that day —when he was there at the store, when he left I went down to the house with him, down to his house. I don't remember just how long I stayed there at his house, but I guess I stayed there an hour or maybe an hour and a half or two hours, I don't remember just exactly how long. We drank some there at his house, a little. Mr. Ferguson had plenty of liquor there at the house, and he drank a right smart there at the house, he had a quart jar full and he had a glass there something like two or three inches deep and I know he drank it two or three times full while I was there, and he had drank some before I went there. I reckon that must have been home made whiskey that we was drinking, it looked like it and it was pretty strong. I guess I left there between four-thirty and five o'clock, and at that time Mr. Ferguson was in no condition to 'tend to no kind of business, didn't look to me like, and I told him I wouldn't go back on duty in the condition he was in. I know he was absolutely under the influences of liquor at that time. That was on Sunday afternoon, the 12th of February, the same day that he was killed that night. After I left his house I was not gone very long until he went back on duty and I heard of the accident. I heard the passenger train come in that night, but I am not positive whether I heard the whistle or not, I didn't pay so much attention to anything like that, but I remember seeing the train and seeing the light, but so far as their whistling or not, I don't remember, but I do remember seeing the headlight and hearing it come in.

Cross-examination:

Mr. Ferguson was at my store somewhere about two o'clock, between two and three, when he first came to my store. I met up with him right close to the store and he

[fol. 200] asked me if I would go in with him and get him a piece of tobacco, and I did it, and I think that was about two-thirty, between two and three, and I don't guess we stayed at the store over twenty or twenty-five minutes, not very long, and then we went over there to his house. I guess we had to go about four or five blocks from the store to go to his house—my store was further up towards Leesville then his house. My store was in the town of Leesville, in the business part of Leesville, about two blocks south of the depot. My store is not in the heart of town, but it is in the railroad district, but I am not right up town. We went down to his house and I stayed there until somewhere in the neighborhood of five o'clock, I suppose about that time; I stayed at his house about an hour or so, or may be two hours or two hours and a half, and during that time I just took one drink, only one, but he took two or three. I took just a small drink, kind of sampling it; I took about a quarter of a glass, or half a glass full, something like that, in a glass about three inches tall, I guess, and that is all I drank, but I stayed there about two hours and a half with Mr. Ferguson and he was drinking all that time, and then I left him at home something like five o'clock and, of course, I didn't see him any more until after I heard of his death. Mr. Ferguson traded with me, I guess he had been trading with me about a year regularly, every month, he bought most of his groceries from me every month during that year; he bought a certain line of groceries from me each month. He was keeping house and his two daughters and boys lived with him, he was keeping the family together. I guess it was about two hours after I left his house until I heard of him being killed. I was up close to the depot at a cafe when I heard of it. I had had supper [fol. 201] at that time; I have a home of my own and I ate supper at home and then went down to the cafe and that is where I heard about it. I don't think I told the railroad people very much about seeing Mr. Ferguson drunk that night until I was put on the stand up here at the other trial, but they knew that I was with him before I came up here on the other trial; I think I told some of them about it before I came up here, but I don't remember just when it was that I told them, with reference to this occurrence, but it wasn't very long afterwards. I did not tell them

the next day, I know it wasn't the next day, because I hadn't seen none of them; it was a short time after that when I did tell them, and, of course, I came here at their request. I didn't know that I can fix the time that I saw Mr. Ferguson at my store any nearer than between two and three o'clock, I just figured it was somewhere about that time, I didn't have any watch with me and didn't know just exactly the time of day, but it was somewhere in the afternoon and not very late. When I went to his house I saw both of his daughters, but I don't think I saw Mr. Carlisle; I didn't see either of Mr. Ferguson's boys, they might have been at home but if they were I didn't see them; the only people that came there while I was there was some colored people, a couple of colored men came up there just before I left, and I left his daughters and Mr. Ferguson and these two colored people there, Mr. Ferguson was standing there talking to them when I left. They are all that I left there; I think that was around five o'clock, but I am kind of guessing at that, it was in the afternoon and it wasn't dark; it was almost sun-down, getting close to sun-down. I happened to go down to Mr. Ferguson's house that day because he asked me to, he said he had some whiskey down there and if I would go down there he would give me a drink [fol. 202] and I went down there to get a drink; that is all I went for; I stayed around there somewhere about a couple of hours and just took one drink, only one. I attended the trial of this case on the former trial and testified in the case. When Mr. Ferguson died he owed me a little bill. I got the most of it from Miss Ona, but I had not collected it at the last trial; I had asked her for it before the last trial; I did not tell her before the last trial that if she didn't pay me that bill that I was going to come up here to court and testify against her. She paid fifty dollars of the bill. I told her if she would pay fifty I would knock off the balance of it, it was about sixty-seven dollars all told.

L. E. Crawford, a witness for the defendant, after being duly sworn, testified as follows:

Direct examination:

My name is L. E. Crawford. I live at 2701 Lillian Street, Shreveport, Louisiana. I am in the employ of the Kansas City Southern Railway Company as Chief Yard Clerk at Shreveport. I was at Leesville, Louisiana on the 12th of February, the night Mr. Ferguson was killed, and at that time I was laying off, on that day, and went down with this crew that was working on this extra that night, with Mr. Burke's crew. I saw Mr. Ferguson that night before this accident occurred, at about five-forty p. m., and at that time he was at the caboose of this train that they were fixing to make up, and he was drunk. I heard this train, the "Plug" [fol. 203] come into Leesville that night; I was at the scale house at the time it came in; I heard him give the station whistle at Leesville, but I couldn't say whether the bell was ringing as it came in or not, I don't recall about that. I saw Mr. Ferguson again that night after I saw him at the caboose, I seen him about six-forty, I imagine it was him, I seen a man working on the train, somebody with a lantern.

Cross-examination:

He was working on extra 496 north bound train; that was a freight train, and he appeared to be inspecting the cars, from where I saw him he appeared to be, he was down at a cut of cars. I know how the inspector's work is done, and from where I saw him he appeared to be doing that; he was fifteen or twenty car lengths from me, I expect, something like that, and the crew was making up the train then, they were switching cars down to where they had put the caboose—they put the caboose on track No. 1 next to the main line and then they shoved the cars in on the north end of that caboose, and in that way built up the train on that track. If I remember right about twelve or fifteen cars had been thrown down to the caboose up to the time the passenger train came in, may be not that many, or may be more. I went down there after the passenger left. I don't

know whether I went down there before or after Mr. Nix came, I don't know when he came, but I was with Anderson when the body was found. I don't know whether it was also found that all those air hose had been shoved in there or not. I see Nick Franklin that night about—well, he came down and coupled up the air after Mr. Ferguson's death, but I don't know what time. That train left there between nine-twenty and nine-thirty. I first saw Mr. Ferguson that evening at the caboose; He did not have any [fol. 204] whiskey there; I didn't see any whiskey that day, I hadn't seen any nowhere that day at all—I sent somebody after some whiskey but he didn't get back—I sent Mr. Ferguson after it, that was when I saw him at the caboose about five-forty; the crew was to go to work at five-fortyfive. I had nothing to do with running the trains or making them up. I saw Mr. Ferguson and sent him off to get some whiskey but he never brought any back. I wouldn't think he was too drunk to go after whiskey, but he was drinking, drunk, he was staggering around. I am not a drinking man and wasn't a drinking man then, but we all take a drink occasionally; I was going to drink some of it myself, I drink whiskey occasionally, once in a great while, but I didn't get any this time; I was willing, if I could have gotten it. I hadn't had any whiskey that day. I slept all day at the Brick Hotel there. I got to Leesville about nine-forty and went to bed about ten-fifteen and got up at four o'clock and went up and ate and went over to the depot, and that is when we was called, and I went on down in the yard. I guess it was about three months after this happened when I first told about seeing this man drunk. I was as Shreveport when I told the claim agent, Powell, about it, after he came to me with the dope; he was the claim agent of the road. I don't know whether the bell was ringing when that train came in or not, it usually is, but I couldn't say in this instance whether it was or not. Mr. Ferguson didn't say where he was going to get the whiskey, he said he knew where he could get some. Brakeman Quinn was also in on that whiskey, but Conductor Burke didn't know anything about it at all; we were not going to drink it there in his caboose, not exactly in the caboose—we could drink it on the train, but we were going to bring it back to Shreveport, with us.

[fol. 205] J. M. Oakes, a witness for the defendant, after being duly sworn, testified as follows:

Direct examination:

My name is J. M. Oakes, I live at Leesville, Louisiana, and have been living there about fifty-one years, born and reared there. I am Justice of the Peace, of the town ward; I have been elected to that office three terms, I have held it nine years. The terms are four years each. I knew D. R. Ferguson in his life time, I knew him all my life nearly. I knew his habits with respect to drinking before his death, he drank to quite a "success". I saw him on the afternoon of the same day he was killed—in the fore part of the noon before he was killed he was at my place, and in the afterpart of the noon, about four-thirty, I was at his place—not at his house, but near the yard fence where he was at, where he lived, and the last time I saw him he was standing there talking with a man by the name of Hicks there; he was inside of his yard. I had a conversation with him on this occasion—I had started to the postoffice after the mail, and he called me by and talked with me, and at that time he was pretty drunk. That was about four-thirty in the afternoon, and I did not see him anymore that night until after he was killed.

Cross-examination:

I am Justice of the Peace; I was elected last January the last time. I had one opponent, I have just had one in the three terms—the last term I was elected with an oppo-[fol. 206] nent. Mr. Ferguson drank it to a "success"—the last few months he drank it pretty rapidly; he also drank to a *success* before he was killed, I have seen him on duty when he was pretty full. He would not go about the depot—he didn't go to the depot when he was inspecting cars, he had his tools down below the depot where he kept his lantern. I would see him down in the yards drunk after night. I would not find him down, but he was drinking—in fact, he offered me a drink several times, and I drank it once or twice; I did not buy it; I drank with him because we was friends. I have bought some and given him some of it, he has drank at my place. I have bought it, but not

for him or anybody else outside, but I keep it at home, and about eight o'clock on Sunday morning he came by my place—the previous Sunday he came there to my place and I gave him a lot of Fig sprouts—I had some nice figs—and he planted them in his yard, and he came back that Sunday and said he was lacking two more to fill out a certain space, and I gave them to him. I next saw him then about 4:30, that is the time I passed his home as I was going to the postoffice, and from the gate where he was to where I would have to pass was about eighty feet, I suppose. He was talking to a man by the name of Hicks. I stayed there about five minutes, I guess, or may be not so long. Mr. Ferguson was inside, and Hicks had just gone, walked off; he (Hicks) was there ahead of me, I saw him leave. Mr. Ferguson offered me some whiskey that evening, he asked me to go to the house and take a drink, but I did not do it, I wouldn't do it, and I asked him not to take any more; I did not take a drink with him. That is the last time I saw him alive. The reason I think that was about 4:30 in the afternoon is because I generally go after the mail about [fol. 207] that time every Sunday, and I feel reasonably certain that it was around 4:30, it could have been a little later, but it was about that time. I don't think it could have been as late as five o'clock hardly. I did not see any other person on his place at that time, other than Mr. Ferguson. I did not see either one of his daughters. I left him at his gate. He was inside; that was his home, and I left him at home. I don't do anything else besides being Justice of the Peace, that is all I do. I was not here at the last trial. I reckon I informed the railroad people that I knew something about this business right after the accident—I don't know why they didn't have me before, I think they had asked me about it, but I don't know why they didn't have me. I don't remember when I first talked to any of the railroad people about this case, it might have been just after the suit was filed, but I don't really have any recollection as to who I talked to,—I believe though that it was the agent, Mr. Beavers, the first man that I talked to—Mr. Beavers, the railroad agent. I was first requested to come up here as a witness some bit ago, the last effort to have a trial, and that was sometime last year, sometime in 1923.

C. W. Ivey, a witness for the defendant, after being first duly sworn, testified as follows:

[fol. 208] Direct examination:

My name is C. W. Ivey. I live at Monroe at the present. I am not now in the service of the Kansas City Southern Railway Company, I am working for the Missouri Pacific Railway Company now, as train dispatcher. I lived in Leesville, Louisiana from November 1919 until November 1922, and was employed by the Kansas City Southern Railway Company there—I was general clerk in the local freight office there. I remember the circumstances of Mr. Ferguson being killed in the yard at Leesville, Louisiana on the night of February 12th, 1922. I was weighing cars at the time that this passenger train from Lake Charles to Shreveport arrived at Leesville at 7:05 p. m. I heard that train come into the yard that night, but I don't recall whether it whistled for Leesville or not, but I recall that it was ringing the bell as it came through the yards.

Cross-examination:

It was ringing the bell when it passed where I was weighing cars; the bell was ringing when I heard the train, when it came up to a distance I suppose of about five hundred yards from me, and the bell was ringing continuously until it got up to the depot, after it passed me. I first had the question of whether or not the bell was ringing called to my attention the day after the accident, I was questioned about it the day after the death of Mr. Ferguson. Mr. Alexander, the Kansas City Southern Claim Agent questioned me about it the next day after Mr. Ferguson was killed. I was here at the last term of Court.

[fol. 209] Redirect examination:

When Mr. Alexander questioned me about it the matter was then fresh on my mind.

J. C. WRIGHT, a witness for the defendant, after being duly sworn, testified as follows:

Direct examination:

My name is J. C. Wright. I live at Leesville, Louisiana and am stationary engineer for the Kansas City Southern Railway Company at present. I was in the employ of the Kansas City Southern Railway Company at Leesville in February, 1922. I remember the circumstance of Mr. Ferguson being killed there in the yards on the 12th of February, 1922. I was at home that night. I judge that I live about three or four hundred yards from the yards. I heard what is called the "Plug" or that extra train come in that arrived at Leesville about 7:05 that night, and it whistled for the station at Leesville, but I couldn't say whether the bell was ringing as it passed through the yards or not, I couldn't say about that, but I heard it whistle for the station though.

Cross-examination:

I live east from the yards, I live on the east side of the tracks, east and south of the depot, about three or four hundred yards, I suppose, from the railroad track. I sup- [fol. 210] pose I live five or six hundred yards south of the depot before I would be even with my house, I live further south than the Standard Oil Company's property, and on the east side of the tracks. I heard the whistle blown for Leesville, but didn't hear the bell rung. I was sitting on my front porch when the train came in that night; my porch was facing west, towards the railroad. My hours at work were from eleven at night until seven the next morning. This matter was called to my attention I suppose in forty minutes, or probably an hour after it happened, after I heard of Mr. Ferguson's death. I don't know whether I could have heard that bell ringing if I had been listening for it that distance or not. I was facing the railroad, about three or four hundred yards away. There was nothing between me and the railroad. I saw the train as it came into the station, but I did not *see* whether the bell was ringing or not, I didn't pay any attention, I didn't hear it ringing, but I don't say it didn't ring.

FRED MCCLURE, a witness for the defendant, after being first duly sworn, testified as follows:

Direct examination:

My name is Fred McClure. I live at Leesville, Louisiana, and have lived there since 1913. I am in the employ of the Kansas City Southern Railway Company, as Clerk in the depot. I was in Leesville on the night that Mr. D. R. Ferguson was killed in the yards there; I saw the train that is supposed to have struck him as it came into the yards that night; I was right in front of the depot, in front of the [fol. 211] telegraph department as it came in. I heard the train whistle for the station that night, but I don't remember if I heard the bell ringing as it came through the yard or not, I wasn't noticing it and I don't remember about that, but I did hear the whistle blow.

Cross-examination:

It must have been about fifteen minutes after the train came in that I learned of Mr. Ferguson's death, somethink like that, may be twenty minutes. I heard the whistle, but I don't recall having heard the bell. As to when I first thought about the bell and the whistle in connection with the Ferguson case, I didn't think anything about it until after—well, when I saw him I thought it whistled, but I didn't remember about the bell. I was thinking about it that very night, and had it called to my attention, but I didn't know whether there would be a question as to whether the bell was ringing or not, I didn't know that I would be up here or that they would have court about it or nothing else, but I heard the whistle blow. I did not think about the bell and remember that I didn't hear it, I didn't think about the bell—I was asked about the bell and I don't remember, but I did remember hearing the whistle; I was first asked about the bell just before the last trial; I was not asked about it the other day. I don't remember when Mr. Alexander asked me about it, but it must have been six or eight months after it occurred; that was the first time that I was asked about it—he didn't ask me about that anyway, just asked me if I knew anything about the case.

Q. Well, did you tell him that you heard the train coming [fol. 212] in and heard the whistle blow?

A. He didn't ask about that. I was asked about it here at the other trial. If I was asked about it here at the other trial I testified then that I didn't hear the bell rung, but I don't know that you asked about that, but if you did I think I testified that way.

J. C. Miller, a witness for the defendant, after being first duly sworn, testified as follows:

Direct examination:

My name is J. C. Miller. I reside in Shreveport and have lived there about five years. I never did live at Leesville, Louisiana. I am in the employ of the Kansas City Southern Railway Company, I am a locomotive fireman. I was in Leesville, Louisiana, on the night that Mr. D. R. Ferguson was killed. I remember the coming in of the train called the "Plug" or the extra train as it was coming into Leesville that night. I was on engine 496 about opposite the depot as that train came in. I never noticed the whistle blowing as that train came in there that night, the whistling board is so far down from where we were at I never noticed the whistle, but I heard the bell ringing as it passed through the yards, and the bell was ringing when it stopped at the depot, and it was ringing when it came in to the depot. I don't know that I had seen that particular train coming into the station on other occasions or not.

[fol. 213] Cross-examination:

As to what my engine was doing at the time the passenger train came in, we had been weighing cars, but I don't know for sure whether we had just pulled out of the scale tracks or whether we were standing still at the time, I don't know for sure whether I had finished my work or not. My work was making up the train, and in connection with the making up of a train I guess I had to weight a certain lot of cars that I didn't have the weights of. I know that I had been called to go north, and my engine was

making up the train to go north, but I don't know whether the cars were weighed or not. I wouldn't weigh them for any other purpose except to put in a train that I was making up. As I would weigh a car I would send them on down to track No. One, or the track next to the main line, as you would weigh a car you would cut it off of the scales and get another one, and shove it on down that way. I remember that we had already placed a bunch of cars on No. One track before I went to weighing these other cars. I saw this train coming into the station there; I did not hear the whistle, but I heard the bell ringing, and the bell was ringing at the time it came into the station. As to whether there was anything specially to attract my attention to the fact that the bell was ringing; the bell ringing attracted my attention to it. That is not unusual, but a passenger train coming in there will attract your attention, and the bell will attract most anybody's attention if they are close to a railroad track, in my opinion. I was first interviewed as to whether I heard the bell rung or the whistle blown here a few minutes ago, that was the first time. I don't think I ever talked with anybody about [fol. 214] it before—this is the first time I have ever been questioned about it. I was here at the other trial, but I wasn't questioned about it then, I wasn't on the stand, and I don't know that I was questioned about it off of the stand—I don't recall that I was ever questioned about it, even by any of the claim agents or railroad people, I don't believe that I was. I don't now recall whether I was ever asked if I heard the bell ringing or the whistle blown previous to the trial of the other case, and I don't recall that I have since been asked about it until I was put on the stand today. I haven't talked to anybody in Boston about it, I haven't had no cause to talk about it; I don't know how they knew what I knew about it. I made a written statement sometime after the accident, in the round house there at Shreveport, just a few days after the accident, but I don't remember exactly how long it was after the accident. I don't think I wrote up the statement myself, I think it was a statement I gave orally and somebody else wrote it up, I think that is the way it was; Mr. Powell wrote it up; I made a statement to him a short time afterwards.

Redirect examination:

I made a statement in response to questions asked me by Mr. Powell about it. When I told Mr. Jones that I had not been asked about it, I mean't in regards to court dealings—I made the statement in Shreveport soon after the accident occurred. That engine that I was on was headed north at the time, and was located about opposite the depot at the time that train came in, on the east side of the [fol. 215] depot; if my engine was moving at the time that train came in, we were moving very slow, I don't think we were moving, I think we were standing still.

L. Thornton, a witness for the defendant, after being duly sworn, testified as follows:

Direct examination.

My name is L. Thornton. I live at Shreveport, Louisiana. I am in the employ of the Kansas City Southern Railway Company as locomotive engineer, and have been for fourteen years; I had been a fireman about five or six years off and on, before that time, but I had fired before I came here, I have been a fireman and engineer all together about twenty-three years, I guess. I knew D. R. Ferguson in his lifetime. I was in Leesville, Louisiana, making up a train in the yard for an extra north the night that Mr. Ferguson was killed, I was operating the engine making up that train. I remember the "plug" or extra that came into the depot at Leesville that night, but I don't remember whether I heard it coming in or not, I heard it when it came up to the depot. I don't know whether I heard it whistle or not, I couldn't say, but the bell was ringing when it came up to the depot. I don't know the distance my locomotive was from the passenger train, but it must have been about the length of the engine and a box car—I was just a little north of where the passenger train made the station stop. I couldn't say just where I was with reference to the depot, because the [fol. 216] passenger train was between me and the depot, I was on the opposite side, but I backed up and the passenger

train stopped just before I got to them with my engine. My engine was headed north, the same direction.

Cross-examination:

I was backing up when the passenger train came in. As to what the purpose of backing my engine was, we back up and go ahead making up a train in the yard, it was a part of my work. I don't remember exactly how many cars I had at that time, but as well as I remember it was about eighteen or twenty; I had already weighed my cars, and to the best of my recollection I had gathered them up and was getting them ready to take them down and place in my train—I don't remember exactly whether that was immediately after we weighed, but to the best of my recollection it was—anyhow we hadn't done very much of our work after we weighed before the passenger train came in; I don't think we had put any cut in. I don't believe I heard the whistle, but I did hear the bell after it got to the depot—I heard it when they run in, and they usually run up to the station with the bell ringing, and they shut it off because you have got work to do. My crew was occupied with my train, but always it is customary with us if a passenger train runs up to glance over and see what kind of signals they are displaying, that is the rule, especially if we are going to follow it out, and it was nothing unusual to glance over. I couldn't say now whether I was through weighing at that time or not.

[fol. 217] T. H. Burke, being re-called by the defendant, testified further as follows:

Redirect examination:

We had not completed our weighing when this passenger train came into the depot that night; we must have weighed about two or three of the cars when they came in, and then we completed the weighing after that.

Recross-examination:

We were weighing cars at the very time the passenger train came into the station. I don't know whether our

engine was moving just at the time the passenger train came into the station or not—I crossed over on the opposite side of the track, and I was down at the scales. The scale track is not a part of the main line track, it is just called the scale track and it comes out right above the depot and runs down parallel with the main line, and comes into No. One track—all the same as No. One track, only the north end is called the scale track. As we weighed these cars we would push them off, shove them back, one at the time, and we had about eighteen cars hooked onto the engine. We weighed the last one away from the engine first, and then as we weighed it we turned it loose and shoved another one on at the same time. We would have to uncouple one end to weigh them.

[fol. 218] C. S. Allen, a witness for the defendant, after being first duly sworn, testified as follows:

Direct examination:

My name is C. S. Allen. I live at Leesville, Louisiana. I am employed on the Kansas City Southern Railway Company, and have been in its employ fourteen years. I am district foreman, and I held that position with the Kansas City Southern Railway Company at Leesville, Louisiana on the 12th day of February, 1922. My duty as district foreman is that I have full charge of the round house and car department, including the car inspectors. Mr. D. R. Ferguson was under my supervision. I was acquainted with the custom of the car inspectors in inspecting trains on what is known as the passing track in February, 1922, and previous to that time. In making up a north bound train the inspector would do his work on the east side of the train, and he would go on the east side of the train to couple up his air—that was the custom pursued by all the inspectors in that yard. There was no reason for that, nothing only it has been a custom ever since a terminal has been there to guard against a train on the engineer's side making up a north bound, and on the fireman's side in making up a south bound. The engineer takes the signals in making up a north bound train, and the inspector would

be on the east side—he works on the same side that the crew did; that is away from the main line, and a man inspecting the train on that passing track would have no business over between that passing track and the main line, none whatever.

[fol. 219] Cross-examination:

He would not have any business on the west side of the train inspecting a train going out north, not during the time the train was being made up, but after the train was made up and the engine was connected to the train he might go over on that side. That is not a written rule, it is an instruction—it is a Government instruction,—it is no written instruction. It is the instruction for a car inspector making up cars in a train going out of Leesville to be on the east side of the train. I don't know where that instruction is, I couldn't say there was ever any other than the practice. I have never seen any written rule or instruction that said to an inspector that he must stay on any particular side of his train while the train is being made up. The inspector is employed by me; he is required to undergo an examination before he can be an inspector; he has got to stand an examination on all the National Safety Appliance connected with the running gear of a train, except the engine, and on his qualifications and his general record he is appointed an inspector; he has first got to be able to stand a mental examination to show that he is qualified, and he has got to have a moral backing to show that he is a man that can be depended upon, and has got to be sober and industrious, and then he is turned loose to inspect the cars and trains according to his best judgment, and he inspects it his way. No train is permitted to go out of that Leesville station without a car inspector having inspected it; it would be a violation of the Federal law if he did, and I would not permit it to be done. The matter of the details of how an inspector does his work is left up to the inspec-
[fol. 220] tor; I can't be out there and see how he does it, and in the first place I select a man that I don't have to watch, a man that is competent, that is the rule. Mr. Ferguson was car inspector under me about two years and six or eight months; he was never laid off during that time,

and there was never a black mark against his work during that time; I never so much as had a criticism against his work, that I can recall.

Redirect examination:

The matter of inspecting was a custom obtained in that yard, and that was Mr. Ferguson's custom, as well as the others. I don't know that there is any prescribed regulation as to which side of the engine the crew works from, other than the way the leads there in the yard are made up, and it is more convenient for the trainmen to work on the east side, if they don't it would be against the main line, and he works on the inside where he can see the engine, because in giving signals to the engineer he has to be where they can see him and where he can see the engine.

Recross-examination:

The fireman does not take signals in that yard where it is not convenient for the engineer, because for the fireman to get a signal in that yard he would have to go through a cut of cars which is very unnecessary. That is true on a straight track, but if there was a curve, a man standing up here couldn't see the engine unless he was on the inside.

[fol. 221] R. L. Morgan, a witness for the defendant, after being duly sworn, testified as follows:

Direct examination:

My name is R. L. Morgan. I live at Leesville, Louisiana. I am in the service of the Kansas City Southern Railway Company, and hold the position of Round House Foreman, and I held that position on February 12th, 1922. My duties are performed at nights. I was on duty the night that Mr. Ferguson was killed. I heard this train that is supposed to have struck him come into the station at Leesville that night. I was in the round house foreman's office, a two-story structure office, upstairs, when it came in. I never noticed the whistle blowing as it came in that night, and I did not hear the bell ringing, I never noticed either one. I

am acquainted with the custom of inspectors in inspecting trains in that yard on what is called the passing track, and in making up a train going north the inspector would work on the east side of that passing track. Besides my official position I was a member of the School Board at Leesville at that time, I was serving my second term as a School Board Member, and at the time this train came in I was talking over the telephone to the School Superintendent, who lives a good ways off—in fact a mile and a half from there, I guess, and in talking to him I says, "Wait a minute, Mr. Stanley, our passenger train is coming in and I can't hear you," and I says, "Of course, you can't hear the train, but it is going along here," and I told him to wait until it passed over the main line, and it drowned my sense of hearing until I couldn't hear myself talking, in fact, I asked him to wait, and I feel confident that if that whistle had whistled, or the bell had rung I would not have noticed [fol. 222] it, because the noise was so dense in talking over the telephone that I had to tell him to wait; it made the usual noise for a passenger train in passing through the yard.

Cross-examination:

I have noticed the inspectors working on the east side while the train was being made up, that is a common occurrence, but I can't say that they don't ever work on the west side, but I can say that they don't practice working on the west side in making the train up—the yards is so constructed, the leads and all, and the inspectors are in with the train crew, and I can't recall that I ever noticed the inspector working from that side, because they wouldn't be working in conjunction with the crew, with them on one side and the inspector on the other; if there is no crew down there, there is no reason why he wouldn't be on the west side if he wanted to, but it is not convenient for them to work on the west side while the train crew is actually working in putting cars on the caboose, but while the train crew is off some other place they can work on the west side just as well as on the east side. For instance if there is fifteen cars in there and he has to connect up the hose, he can do it on either side while they are away, there is nothing to keep them from either side; he could inspect it and

connect up his air hose and it would make no difference which side he worked on while the engine was away. The train passed opposite me, and as it passed it made a great deal of noise; I was in a house that was cement on the inside, and what impressed me was the noise of the train interfering with my talking over the telephone. I never had thought about the difference in the noise of a train passing me and the noise of a train approaching me, I never had noticed it, and I don't know whether there would be any [fol. 223] difference, or whether the noise would be greater as the train approached me than it would if I were out to the side of the train as it passed me or not.

M. J. Miller, a witness for the defendant, after being duly sworn, testified as follows:

Direct examination:

My name is M. J. Miller. I live at Kansas City, but I lived at Leesville, Louisiana, on February 12th, 1922, I was road master for the Kansas City Southern Railway Company at that time. I am at present on leave of absence. On the night of February 12th, the night Mr. Ferguson was killed, I was at the station at the time the train from Lake Charles came in and reached Leesville at 7:05, and I noticed the train coming in, I left home when I heard the train whistle for the crossing south of Leesville, and I got to the station before it got there. I heard the train whistle for the station south of Leesville, and I recall hearing it whistle again for the station, it whistled after I arrived at the depot. I don't recall hearing the bell ring. I was walking to the depot, I only lived a block from the station. I saw the train as it was coming in, I was standing on the platform when it arrived. It was not running any faster than it usually did as it came in there on this occasion, not to my knowledge. The train was on time. I heard of Mr. Ferguson's death very shortly after the train left, and just as soon as the train left I went to my office about four hundred yards south of the station, and was looking over some correspondence when Brakeman Anderson came by and notified me that Mr. Ferguson

[fol. 224] was killed, and I went down there immediately, and when I went down there I saw his form in the darkness, and I went a little way to where his lantern was and picked it up and brought it back and looked at Mr. Ferguson to see whether he was dead or not, I didn't know, and Mr. Anderson didn't know. His lantern was setting seventy-seven feet south of his body when I picked it up, or sixteen hundred feet south of the station, about four feet and eight inches to the side of the east rail on the main line, I made a measurement of those distances, and the lantern was seventy-seven feet south of the body, and was setting four feet and eight inches from the east rail of the main track. I noticed a cut of cars there, and the cars were on No. one track; when I arrived there the train was already coupled up, and the lantern was five feet and two inches from the passing track on which the cars were setting, practically five feet two inches from the west rail of the passing track, and was burning when I got there, and was facing to the east. I did not have any information as to how many cars were on the track at the time the accident occurred.

Cross-examination:

The lantern was facing the cars on the side, or passing track—facing east in other words, seventy-seven feet south of Mr. Ferguson's body, and I took the lantern down there and saw that he was dead, I felt of his body and looked in his face. I held the lantern until the coroner came, I did not take the lantern back down there and leave it, I held it and went down there and showed them where it was. There was a string of cars on this passing track along there at that place when I arrived there. I made those measurements of the distance there that night. I did not measure it as I picked the lantern up and carried it on down, I picked the lantern up and then went down to the [fol. 225] place. The head blocks were there, the lantern was setting right side of that head mark, and besides, there was a mark there in the ballast where the lantern had been setting, a round mark where the bottom of the lantern was setting, in the cinders. The first piece of flesh found

was about forty feet from the lantern, about the size of the end of your thumb, and from there on up you could see where his body had rolled; a little more than half way from the lantern to the body is where I found this flesh; that was the first place where I found any sign of where the body had dragged or rolled, and there was evidence of dragging and rolling all the way down from that point on down to where the body was; I can't say that there was any blood, but there was one piece of flesh about the size of your thumb, and then a very small particle but no blood. That piece of flesh was about the center of the two tracks, that is, between the two tracks. I lived a half block west of the depot, and I walked down to the depot.

Redirect examination:

It was about forty feet north of where the lantern was setting to the place that I saw the piece of flesh, and then from there on to where the body was I saw evidence of where something had been rolling on the ground. No part of the body had gotten under the train, and no part of it was cut off, it was lying out and the feet were towards the passing track and his head was towards the main line, *which* his hand up something like that (indicating), lying on his left side. I don't know what part of town Mr. Allen lived in that time, I couldn't say where he lived.

(Recess 'till 9 o'clock a. m. Nov. 19, 1924.)

[fol. 226] H. H. Alexander, a witness for the Defendant, after being first duly sworn, testified as follows:

Direct examination:

My name is H. H. Alexander. I am Assistant Claim Agent for the Kansas City Southern Railway Company. It is a part of my duty to ascertain the facts relating to any accident that occurs on the line of railroad in my territory; I do that after the accident occurs. I know a young man by the name of Reed Holton, I have met him. (Witness was handed paper.) This statement purporting to be signed by Reed Holton on the 13th day of February, 1922, is the statement that he made to me and signed in my pres-

ence. I wrote this statement, and I got the information that I put in the statement from Mr. Holton. I asked him what he knew about it, and I wrote down correctly what he said about it, and he read it over and then he signed it, and he said it was true.

Counsel for defendant introduced in evidence the statement above referred to, which is as follows:

Leesville, La., Station, 2-13-1922.

Mr. Reed Holton says: I live *live in* Leesville with Mr. Joe Holton, my father. I am 21 years old and in company with Travis Barnhill and Ellie Dowden we were going down K. C. S. Ry. tracks to show at Staples on 2-12-22 and when about even with Standard Oil Spur switch stand at about 6:45 p. m. I noticed Mr. D. R. Ferguson, car inspector for K. C. S. Ry. whom I had known for several years standing at north end of string of cars between main line and track No. 1— his lantern was lighted and sitting on ground between main line and track No. 1, facing east. Mr. Barnhill [fol. 227] spoke to Mr. Ferguson and Mr. Ferguson says howdy boys. It was dark at this time. About fifteen or twenty minutes after we passed Mr. Ferguson Ex 601 passed us going north at speed I would judge about 30 miles per hour. I heard Ex 601 whistle for Staples, also for road crossing which is just south of Leesville yard and about three quarters of mile from where we passed Mr. Ferguson—head light was burning on Ex 601 and was very bright—track is straight from where road crossing whistle was sounded to Leesville Station. I did not notice whistle for Leesville Station. Can't say whether whistle was sounded or not. Bell was not ringing when Ex 601 passed us. Train passed us about even with K C S section house which is located near South end of Leesville yard. I did not notice anything unusual about Mr. Ferguson as we passed him.

Reed Holton.

Witness- to reading & signing statement: Webb Wynne, H. H. Alexander."

(Witness was handed another paper.) This statement purporting to be the statement of Travis Barnhill was

made by him and signed before me, that is his statement. I got the information that I put in this statement from Travis Barnhill himself, and I wrote it down correctly as he told me, and he read the statement over before he signed it.

Counsel for defendant introduced in evidence the statement of Travis Barnhill, above referred to, which is as follows:

"Leesville, La., Station, 2-13-1922.

Mr. Travis Barnhill says: I live Leesville, La. Southwest of K. C. S. Depot, about 1/4 mile with my father Roy Barnhill, and I am 18 years of age in April and in company with [fol. 228] Reed Holton and Ellie Dowden, both of Leesville, we were walking down K. C. D. Ry. tracks south of depot to Staples to show when just opposite Standard Oil switch stand I noticed Mr. D. R. Ferguson, K. C. S. Car Inspector, standing at north end of a string of cars and on west side of string of cars and between main line track and No. 1 track. I had known Mr. Ferguson for seven or eight years, and as we passed Mr. Ferguson I said Howdy to Mr. Ferguson and Mr. Ferguson said Howdy do boys. At this time it was dark and I noticed a car inspector's lantern lighted setting down between main line and No. 1 track, facing east. I would judge at time we passed Mr. Ferguson it was about 6:45 p. m. on 2-12-22. No. 601 passed us at about even with K C S Section house which is near south end of Leesville yard and I would judge Ex 601 passed us at about 15 to 20 minutes after we had spoken to Mr. Ferguson. I heard Ex 601 whistle for Staples and also whistle for road crossing at south end of Leesville Yard. Staples is about 1/4 miles south of where we passed Mr. Ferguson and from road crossing to where we passed Mr. Ferguson is about three quarters of a mile. I didn't notice train whistle for Leesville station, bell was not ringing when Ex 601 passed we boys. Headlight was burning on Ex 601 and was very bright. I would judge speed of train when passed us to be about 30 miles per hour and about 1 mile or more from Leesville station. Main line track is straight from where train passed us to Leesville station; in fact, from just this side of station at Staples to Leesville station. I didn't

notice anything unusual about Mr. Ferguson as we passed him.

Travis Barnhill.

Witness to reading and signing of statement: Webb Wynne, H. H. Alexander."

[fol. 229] Cross-examination:

These statements were signed at Leesville; I don't remember at what place in Leesville they were signed, but I believe it was at the station—anyhow, it was somewhere there about the railroad. I think someone told me about these boys having seen Mr. Ferguson and I sent for them, or got hold of them some way—any way, I got them word that I wanted to see them. I asked them questions and they told me what they knew about it. They did that in response to some questions that I asked them, I asked them to tell me what they knew about it, and they told me and I wrote it down; that was the next day after Mr. Ferguson was killed. I don't recall what time of the day it was, but to the best of my recollection it was sometime in the afternoon, or in the evening—it was between twelve and night.

Redirect examination:

Leesville is in Vernon Parish, it is the County seat of Vernon Parish, the court house is there at Leesville. I judge Leesville is a town of three or four thousand people.

Counsel for defendant introduced in evidence the cross examination of Mrs. Jewell Lewis, as given on the former trial of this case, which is as follows:

"I heard the train whistle for Staples that night. I could hear it pretty distinctly. I heard it leave Staples. I was listening for it to whistle for Leesville, because we were going to leave this house we were at and start for town when it whistled; we were listening for it to whistle and then we were going to start when it whistled, and we [fol. 230] said: "When it whistles we will go", and when we heard it pulling into Leesville we started; we didn't

intend to go until we heard it whistle. I suppose the bell would ring when the whistle blows. I heard the train for Staples, and heard it leave Staples, too. I heard it coming; I heard it when it was down below the yards in Leesville, and knew it was coming. I knew it by the noise.

Q. Why did you want the whistle to blow?

A. Because it was always supposed to blow, and naturally me living clost to the yards you would listen to things like that. I knew what train it was, and knew what time it arrived there; I believe it was right on time that night.

Q. If you could see it and hear it making a lot of noise, why did you want to listen to the whistle—you saw the headlight, too?

A. I wasn't close enough to see the headlight, there was shrubbery between us, I could hear every sound in the yard on that slope. I was off on a slope.

E. H. Holden, a witness for the defendant, after being duly sworn, testified as follows:

Direct examination:

My name is E. H. Holden. I am general Superintendent of Transportation for the Kansas City Southern Railway Company, and have been in the service of that Company since 1906. I have been railroading since 1884, and began service with the railroad in the capacity of clerk and telegraph operator and train master and general superintendent of transportation on several lines. It is not the practice or rule of the Kansas City Southern Railway Company to dim the headlights in entering yards or approaching stations, whether dark, fog, or raining, or misty weather, when the vision might be obscure, when the headlight is [fol. 231] needed. It is my opinion that approaching a station or going through the yards is the time that the engineer needs what light he can have to know any obstruction on the tracks, or any persons that might be on or near the track. At the station they have what is known as the train order signal, that stays in two positions, or to warn them that there are train orders for them. The

Kansas City Southern has no rule requiring engineers to dim their headlight, it is their rule or practice for them to maintain them lighted in approaching stations and passing through yards.

Cross-examination:

The position of the switches are indicated by lights; they are equipped with lamps or lights to show the engineer whether the switch point is turned favorable to him or against him. It isn't an infrequent occurrence for the lights to be out—sometimes the jar of the car will extinguish that light, and the engineer doesn't run over it, because the absence of the light indicates that there might be something wrong. If the switch is not turned against him and is favorable there is a green light, and if it is turned against him there is a red light; and if neither shows it is an indication; if the light is extinguished, that there is something wrong. I don't think he can see those lights better without the headlight than he can with it, and I don't think I could see a green light out yonder better if I had no light, they use the light all the time. I don't think I could see those lights better with no light at all than if I had a headlight. I guess you could see them equally as well if you had no headlight. The lights at the station are marked by light—a certain kind of light means that he has a train order, and a certain other that he has not; and then they carry a signal that lets him know whether he must get a train order or not; that is, the red light or combina-[fol. 232] tion of light means there is a train order or to get a clearance. We use a light known as an electric headlight, or arc light, and a very bright light on the road engines; on the switch engines in the yards we use a weaker light as not quite as strong a light is required, but many engines in the yards has the same light as on the locomotive. It isn't required that they have one as strong as on the road, but there is no prohibition of one, and when we are coupling a switch locomotive change they put on a light not so strong. I think the difference is in the candle power of the globe; in other words, we use a globe on our switch engines that is a little less than half the power produced on the road engines, I believe they measure it that

way; it is not required so strong as the road locomotive. I have done a little bit of switching in my time as is required of an officer but not as a switchman. I have been in the yards at nights and I don't know that the brightness of the road engine impedes the progress of switching, we use them constantly in the yards. They cut them out sometimes on account of the brightness, the glare is so great it interferes with their work; there might be times that they cut them out for that reason, but they are working constantly in the yards with a locomotive, a great portion of the time. In regular yards the trains are made up by switch engines, but it is not an infrequent occurrence to use the road locomotive in the yards.

Redirect examination:

If there should be an obstruction on the track, or a man dangerously near, and the engineer has a bright light ahead of him he would be able to discover the object more readily, and to stop and avoid injury, than if he had a dim light; in other words a man going through the yard or approaching a station, a place where the people might be, could dis- [fol. 233] tinguish an obstruction on the track more easily with a bright light than a dim one.

Recross-examination:

In approaching stations the requirements of engineers with reference to speed vary a great deal, at some stations it is not necessary to reduce the speed and sometimes it is required to reduce to a certain speed. Well, as I say, it isn't a general requirement to keep his train under control in going through the yards. I don't know how soon or in what distance a train running twenty-five miles an hour could stop, only from hearsay.

J. F. Anderson, a witness for the defendant, after being duly sworn, testified as follows:

Direct examination:

My name is J. F. Anderson. I reside at Kansas City, Missouri. I am in the service of the Chicago, Milwaukee

& St. Paul Railway Company, and my position is Superintendent of Terminals. I have been in the railroad business thirty-eight years. The rules of the Chicago, Milwaukee & St. Paul Railroad with respect to headlights on engines pulling passenger trains through the yard up to the depot require the lights to be kept burning full voltage, in going through the yards and up to the stations, all sorts of points, as well as the main line in the country. In my opinion, as a railroad man, if the light is kept full force the engineer is able to see the conditions in the yard, and whether or not there are any employees in dangerous positions, also any other obstructions or cars on the track, and it is also considered a safety measure for the employees [fol. 234] working about the yard, and naturally the safety of the passengers are also involved in that; and it is also my opinion as a railroad man that it is safer to keep the light burning, considering the safety of those who might be near or on the track, and the safety of the engineer and his train—it is a better policy to keep the light burning, in my opinion.

Cross-examination:

Most of our engines are equipped with dimmers. I can't tell why; our rules do not call for dimmers in the operation of the engine. The safety appliance law requires us to equip our engines with dimmers, but don't specify the use of them; they do require us to equip them with dimmers, and we do equip them with dimmers in compliance with that law, but we don't use them because in our judgment it is best not to. There is a difference of a hundred and fifty watts between the power of the lights that we use on our road engines and the lights we use on our switch engines—we use a two hundred and fifty watt lamp on the road engine and a hundred watt on our switch engine, a ratio of one hundred to two hundred and fifty. It is better for the service in switching to have a dimmer light.

Q. It is better because the road light would tend to blind the switchmen in their work?

A. There is always more than one engine, as a rule, working in this yard, and of course, they focus on each other. As to whether a glaring light would tend to interfere with

the men working in the yard, that would depend on the distance away. If they are all the way from one foot to one hundred feet away it is considered better policy to the man working in the yards to use a dimmer light. It is better for the men working in the yard on account of the [fol. 235] glare of the light, only for signals; the engineer can catch lamp signals better behind a smaller light. It is a fact that a man in front of one of those bright lights can't look at it, and if he does, it will blind him and confuse him, if he looks at it. I do not think that he has got to look at the light in doing the switching and that that is one of the reasons for using a dimmer light.

Q. You don't have any regard to what might happen to a man by reason of him being blinded?

A. The more light is better for him, except in giving signals. I will admit that if he was to turn and look right into a very bright headlight within a reasonable distance that it would blind him. I don't think that if he was on the end of a car going up to set a brake and looks right into one of these bright lights that it would have the effect of him falling off; I don't think a blind man could work on top of a box car as well as one with good eyes. I don't feel qualified to make any definite statement as to the distance a train of three or four or six cars could be stopped running at a speed of twenty-five miles an hour or less.

Redirect examination:

Switch engines in a yard don't move very rapidly, and in most cases they are not moved a great distance at the time. It is my observation that some of the roads use their dimmers and some of them do not, it is a matter of judgment with the railroad management as to which is the better policy. I don't know of any road that uses the dimmers on passenger trains in approaching the stations. The Chicago, Milwaukee and St. Paul Railroad has over eleven thousand miles of road, and in a general way reaches the larger cities, Chicago, Milwaukee, Minneapolis, Spokane, Seattle—From Chicago to the coast in the Northwest; and from Milwaukee to Kansas City, in the Southwest; and from Milwaukee to Rapid City in the West.

[fol. 236] W. GERMER, a witness for the defendant, after being duly sworn, testified as follows:

Direct examination:

My name is W. Germer. I reside at Little Rock, Arkansas. I am in the service of the Chicago, Rock Island and Pacific Railway Company. That road has about eight thousand miles of road, and reaches all the way through from Chicago to El Paso, Texas, and from El Reno to Memphis, all through Illinois, Iowa, Kansas, Oklahoma, Texas and Arkansas. I have been in the railroad's service thirty-five years. I started in as a locomotive fireman and fired about eight years, and was promoted to an engineer, and I ran an engine for about twenty years, and was promoted Road Foreman of Equipment, and have been Road Foreman of Equipment about ten years. I am acquainted with the custom obtaining on the Chicago, Rock Island and Pacific, as to the use of headlights on its passenger locomotives in going through yards and approaching stations in reference to whether the engineer is required or supposed to dim his headlight, or keep it full power in going through yards and up to stations, they are required to have their headlights displayed or burning from sunset to sunrise while on the main track, and never dim them unless at the end of some track, or going to meet a train—it requires that they shall dim the headlight while on a passing track, but never on the main line. In my judgment, as an engineer, it is safer in the operation of a railroad taking into consideration the safety of the engineer and the fireman and the passengers that he is pulling on a train, and also taking into consideration the persons who [fol. 237] might be on or near the track when he is pulling through a yard and into a station on the main line for him to keep his headlight burning brightly, so that a person that happened to be around there could see the train coming, and know it was coming on account of it being on the main track, and also not to obscure the view of the engineer, because it is necessary for the engineer to see where he is going, and the bright headlight would enable the engineer to see an obstruction on the track further than a dim one.

Cross-examination:

Of course all our engines are equipped with dimmers for the purpose of dimming them when in a passing track. It is against our rules to use the dimmers on passenger trains in going through yards in which employees are working at night and other trains are being made up, we are required not to use them. We are required not to use them on any train whatever in going through or into the yards, not on freight trains, as long as you are on the main track and as long as the train is in motion. In pulling into a yard the engineer will have his train under control, but it is up to the freight trains and switch engines to keep out of the way of passenger trains, they don't have to look-out for them—that is on the Rock Island. With the present air system, a train running twenty-five miles per hour could stop within two hundred feet, I believe, but to stop within two hundred feet at twenty-five miles per hour would be a pretty quick stop, it would depend on how the engineer applied his brakes, we have a service application and an emergency application, and I don't know the exact figures right off hand, but he could stop pretty quick, and if the train was longer it would take more to stop it, according to the tonnage of the train and the momentum—I might add that at one time we made a test running sixty [fol. 238] miles an hour with a seven car train, and stopped in eighteen hundred feet, but I never did have occasion to get the exact number of feet at twenty-five miles an hour.

J. H. Kent, a witness for the defendant, after being duly sworn, testified as follows:

Direct examination:

My name is J. H. Kent. I reside at Denison, Texas. I am in the service of the Missouri, Kansas & Texas Railroad. I do not know what the mileage of that road is, but it goes through Missouri, Kansas, Oklahoma, Texas and Arkansas. I am a locomotive engineer, and have been for about eighteen years. I know the rule or custom obtaining on the Katy, we will call it, when an engineer is running a

passenger train on the main track and approaching a station, or going through the yard and approaching the station, as to whether it is the custom obtaining on that road for him to dim his headlight or keep it burning full power, and the custom on the M. K. & T. is to keep it burning full power while on the main road and coming through the yards up to stations. From my experience as an engineer for eighteen years, I consider it much better for the engineer to keep his headlight burning brightly as he goes through the yard and up to the station than to have it on the dimmer, taking into consideration the safety of the public who might be on the track or in dangerous proximity to the track, and taking into consideration the safety of the engineer and fireman, I consider it much safer. I judge that you could see a man about five hundred or six hundred feet ahead with a headlight with which a locomotive is equipped.

[fol. 239] Cross-examination:

That is the kind of locomotive we run over on our road, that we can see a man five or six hundred feet ahead with a headlight burning. We do not run with dimmers all the time—we run with a bright head light, but we have a dimmer on it in addition to that we use a switch where they cut the power of the light down, and you can cut it down a third or may be more; in addition to our headlight we carry indicator lights or markers, and there is an extra globe in the cab in case it is all cut out that shows the number of the train, that is the indicator. Those indicators are not on the side of the headlight, but the globe is in the headlight cage, that lights up the cage inside and shows the number of the engine on each side of the head light, so if a man meets us out on the track he can tell the number of our engine, and he also knows the number of the train that engine is pulling—the order gives him the number of the train his engine is pulling—meet number so and so at such an- such a station, engine number so and so, and when he meets you out there he knows the number of your engine and goes on. We don't need any headlight for that. Where we pull in a siding and not clear, we cut in the dimmer to show him that we are not in the clear, and our main headlight would signify the same thing, it would

indicate to the man that we were not in the clear, and also the dimmer will. If we are in the clear we cut our light entirely out, and if we are not in the clear we use our headlight of our dimmer—the thing that indicates that we are in the clear is that we have no headlight at all. I mean that when we get into a passing track and waiting for the train on the main line that we cut our headlight out entirely, that is the rule that signifies we are in the clear, and if your are not in the clear you can use the dimmer; the [fol. 240] headlight would answer that purpose also, but it makes it more easily for the approaching train to see with the dimmer, it doesn't blind them so, it isn't such a bright light, but yet it signifies the same thing, that the train is not in the clear. We use the dimmer so that our light will not blind the man in front of us and he can tell our position on the track; if we keep our bright light on he knows we are not in the clear, but he can't tell our position—for instance, he couldn't tell whether he was up near our engine or way down, because he would be blinded, and that is the reason we use it. In other words, as he approached if we use our dimmers and cut our light down he could ease on down on the main line opposite our train and know where our train was without running into the tail end of it at the other end of the switch, but could stop before he got to the tail end of it.

Q. Now, if you had your bright light burning he would have to stop way back at the other end or he would knock the tail end of your train off?

A. No, because they would have the proper flag out, but it makes it more convenient for the man coming in, and it gives him a better view until he passes this headlight, and when he passes of course he has his own headlight and he can test his own distance.

Q. In other words, the headlight approaching, he can't tell his exact position because it blinds him?

A. Well, it don't exactly blind him; I couldn't say that it confuses him, but it is a disagreeable brightness; I don't know that it enables him to control his train better, but it might enable him to locate the distance better, and that would enable him to control his train better.

[fol. 241] G. W. Lillie, a witness for the defendant, after being duly sworn, testified as follows:

Direct examination:

My name is G. W. Lillie. I am not with the Kansas City Southern Railway Company now, but I was with them, and was Master Mechanic at Shreveport. I am acquainted with their engine No. 601. The pilot beam on Engine 601 and engines of that type is ten feet long. I couldn't say what the distance is from the top of the rail to the headlight, I didn't measure that at the time I made these measurements shortly afterwards, but on the average engine it is in the neighborhood of about twelve feet. It is forty-one and a half inches from the top of the pilot beam on Engine 601 to the top of the rail; the pilot beam is eleven and three-quarter inches wide; it is approximately five inches from the top of the rail to the top of the tie; the usual width of a tie is six inches, that is the standard, I believe. This engine 601 is equipped with dimmers, and those dimmers have a small resistance, about the size of a broom-stick and about six or eight inches long, a coil of wire so when the current goes through it, it takes up part of the voltage and reduces the light that goes to the lamp, and it also reduces the filament, or heat, so that it is not as hot, and the engineer can regulate that by a switch that he throws one way or the other, and he can cut down the strength of that light by the use of the lever.

Cross-examination:

It is one of the incandescent lights, but it is not a carbon, it is a gas light, and has a number of wires in there. I couldn't say how those wires stand, as to whether they run [fol. 242] back and forth long ways of the globe or whether they stand out more in the center—they are in the center, but I couldn't say exactly how they stand. We only have one globe in the headlight now, but we used to have two; we just had one globe in the headlight in 1922, and the power of that light was diminished or increased by the switching of that lever, it is what they call a three point switch, off, on and dim. My recollection is that this *rh*ostat cut the light down to about one-third of the usual

brightness. I am told that at one time they did use the larger and the smaller globe in there, but not while I was there. In the headlight frame, or case there was really two globes, one the headlight globe and then a globe that showed the indicator or engine number on the side—there is a small light, but that is entirely different from the main headlight—it is in the cage but it is behind the reflector.

L. E. Crawford, being recalled by the defendant, testified further as follows:

Redirect examination:

I stated yesterday while on the stand where I was when this passenger train came in that is supposed to have struck and killed Mr. D. R. Ferguson—I was at the scale house, and the cars that were being weighed at that time were just south of the scale house, approximately four hundred feet. After this train came into the station we walked down to the head of our train that was being made up, down to the head of the cut of cars that were already on track No. One, and when I got down there I saw a lantern sitting right about three or four feet ahead of the cars already standing [fol. 243] there, north of the end of that cut of cars and right in the middle with respect to the two tracks, between the two tracks—that is between the main track and the No. One track. The back end of those cars that we were weighing at that time was approximately five hundred feet from the north end of this cut, and back down against this cut that was already on that track. I walked down ahead of those cars that were being weighed, down to the cut that was being coupled up, all the way down there. I wasn't sure that we saw Mr. Ferguson's body as we walked down that way, but we thought we did, there was a bulk of something lying in the path, it was at night, and it later turned out to be Mr. Ferguson's body.

Cross-examination:

I was at the scales. When this passenger train came in we had hold of some eighteen cars, but they had not all been weighed, some were still being weighed, we weighed some a

few minutes after it came in, and then the train started backing south with these cars, pushing them back to couple up to the cars that were already on track No. One, and after the cars had all been weighed I left there and walked back to the rear end before he started to shoving back. I don't remember whether I left the scales before he coupled up with those cars or not, because he had to pull over the dead rail before he started back to couple up. When they finished weighing them they had about eighteen cars south of the scales, something like that, about four hundred feet. A car is from thirty-four to thirty-eight and forty to forty-two feet long; there wouldn't be any less than twenty feet long. Twenty cars at twenty feet would be four hundred feet, but as a matter of fact, there are no cars on the road that are less than thirty feet, and that would be approxi- [fol. 244] mately six hundred feet, close to it—it wouldn't lack more than sixty feet. My judgment is that Mr. Ferguson's body was about a thousand feet south of the scales. I don't think that I have got that wrong—it is eleven hundred feet from the scales to where he was found. I walked down there to where he was and the train followed along behind—I walked ahead of the train; I first walked about six hundred feet further than the engine had to go and then on down ahead of the train. The train was moving under a signal. When the train first begin to move I was at the south end of the cut. I mean to say that the train did not go as fast as I walked.

J. F. Prudhomme, a witness for the defendant, after being duly sworn, testified as follows:

Direct examination:

My name is J. F. Prudhomme. I am in the service of the Kansas City Southern Railway Company, and was in its service in February, 1922. At that time I was working headlights. I was acquainted with its engine No. 601. That engine was equipped with dimmers in February, 1922, it was equipped with a dimmer coil, just a resistance coil to cut the light down, you can throw it off on the dimmer, a two hundred and fifty watt globe in the headlight house,

which — equivalent to about five hundred candle power; this dimming device was in good condition on that engine. I have made a test with that light to determine how far ahead on a straight track I can see an object the size of a man; you can distinguish a person a thousand feet ahead with the bright light. It is twelve feet and six inches from the top of the rail up to the headlight.

[fol. 245] Cross-examination:

The dimmer would cut the headlight down to about twelve volts, which would be about a hundred and fifty candle power, about a third of the original headlight; that of course would reduce the brightness of the headlight a great deal, it would reduce it about two-thirds as to the distance you could see. We use a hundred watt light on our switch engines in the yards, and a two hundred and fifty watt on the passenger and road engines.

The defendant rests.

Mrs. Ona Carlisle, recalled by the plaintiffs in rebuttal, testified as follows:

Redirect examination:

I was at home in the afternoon of the day that my father was killed. Mr. Reed Adams did not come to my house that afternoon and tell me that my father was down in the yards drunk, and he did not tell me that at any time that night; I did not send him to hunt Mr. Franklin. I know Mr. Peace, a merchant down at Leesville. My father traded with him some, and he claimed that my father owed him a bill when he was killed; Mr. Peace asked me for that, and said what he was going to do if I didn't pay him that bill before the last trial—he asked me for the money for the bill and I told him I didn't have it, and he thought I had some money, you see, and he told me if I didn't pay the bill [fol. 246] before the trial came up that he would come up here and testify against us, but he did not tell me what he would testify to. Mr. Peace was not at my father's house that Sunday afternoon and Mr. Oakes was not there that afternoon. My father was not there after two o'clock,

other than the time he was there at six o'clock; he left at 1:30 and didn't come back until six.

Cross-examination:

Mr. Peace was here and testified at the last trial. I believe I testified about him threatening to come up here and testify against us at the other trial—I am sure I did.

OFFER IN EVIDENCE

Counsel for Plaintiffs introduced in evidence the following provisions of the Interstate Commerce Commission:

"(c) Such headlights shall be provided with a device whereby the light from same may be diminished in yards and at stations, or when meeting trains.

131. Locomotives Used in Yard Service.—Each locomotive used in yard service between sunset and sunrise shall have two lights, one located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of the locomotive under the conditions, including visual capacity, set forth in rule 129, to see a dark object such as there described for a distance of at least three hundred feet ahead and in front of such headlight; and such headlights must be maintained in good condition."

Testimony closed.

[fol. 247] STIPULATION RE STATEMENT OF FACTS

It is agreed by and between counsel for the plaintiffs and the defendant, respectively, that the above and foregoing 169 pages contain a full, true and correct statement of facts, and all the facts adduced upon the trial of the above entitled and numbered cause, and that same may be approved, allowed and ordered filed as a part of the record in said cause.

Jones, Sexton, Jones & Buck, Keeney & Dalby, Attorneys for Plantiffs. King, Mahaffey & Wheeler, Attorneys for Defendant.

In District Court of Bowie County

Order Approving Statement of Facts

The above and foregoing statement of facts having been agreed to by and between counsel for the plaintiffs and the defendant, respectively, and having been by me examined and found correct, same is hereby approved, allowed and ordered filed as a part of the record in this cause.

Hugh Carney, Judge 5th Judicial District of Texas.

[File endorsement omitted.]

[fol. 248] In Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana

No. 3122

Kansas City Southern Railway Company, Appellant,

v.

Leonard Jones, Administrator, Appellee

Appeal from the District Court of Bowie County

Opinion—Filed February 11, 1926; in Supreme Court November 13, 1926

The action was brought under the Federal Employers' Liability Act by the administrator to recover damages for the benefit of the minor children of D. R. Ferguson, the deceased. The death of D. R. Ferguson occurred while he was in the service of appellant as a car inspector at Leesville, Louisiana, on February 12, 1922. As claimed by the administrator, the deceased was killed in appellant's yards at Leesville while he was between the main line track and the passing-track, engaged in the duties of inspecting the cars being used to make up a freight-train, by being struck by a passenger-train going north through the yards on the main line track and approaching the depot. It was alleged that the appellant was guilty of negligence proximately resulting in the death of D. R. Ferguson in that: (1) There

was failure to diminish the light given out by the headlight of the passenger-locomotive as it passed through the yards; (2) there was failure to ring the bell and to blow [fol. 249] the whistle of the passenger-locomotive in warning of the approaching and passing of the train through the yards; and (3) the passenger-train was operated through the yards at a higher rate of speed than was customarily done.

The appellant answered by general denial; and further specially pleaded that if it be true as alleged that the deceased was killed by appellant's passenger-train, his death was the proximate result of a risk and danger assumed by him in the course and performance of the duties of his employment, setting out at length the details. The appellant further specially pleaded, setting out the grounds, assumed risk and danger of being struck by reason of the operation of cars through the yards; that the deceased was struck and killed solely by reason of his own negligence in knowingly placing himself too near its main line track and moving train; that the passenger-locomotive was equipped with a device for diminishing the light produced by the headlight as required by the order of the Interstate Commerce Commission, and that the deceased assumed any risk or danger, if any there were, of failure to diminish the light produced by the headlight, because the deceased fully knew that for a long time before the injury it was the rule of the company, and a custom of employees operating passenger-locomotives on the main line track through the yards into the station of Leesville, not to dim or diminish the light.

The case was tried before a jury, and in keeping with the special findings of the jury the court entered judgment for the plaintiff.

The deceased was employed as a car inspector by the appellant in its yards at Leesville, Louisiana, and he had been working in that yard for twelve years. He was 62 years old and was five feet eight or nine inches tall. His [fol. 250] daily hours of work were from two o'clock in the afternoon until ten o'clock at night. Appellant is engaged in interstate and intra-state commerce. Leesville is the county seat of Vernon Parish, having a population of about 4,000, and is a freight division point. The depot, 165 feet long, is located west of and adjacent to the main line track.

The main line track runs practically north and south. Paralleling the main line track, and on the east side of it, is a passing-track extending into the yard. The distance between the main line track and the passing-track from center to center is fifteen feet, and from rail to rail it is ten feet. There is approximately a six-foot clearance between two trains on those tracks. The yard is located some distance south of the depot and lies east of the main line track. There are six tracks besides the passing-track and the main line track in the yard. The yard tracks are used for making up freight-trains, for general freight use, and for storing cars. Freight-trains are made up on any of the tracks east of the main line track that may happen to be available. The employees, including the deceased, were familiar with the tracks and with the width of the same.

D. R. Ferguson went to his usual work at two o'clock p. m. on Sunday, February 12, 1922, and about 7:20 p. m., just after dark, his body was found lying on the ground between the main line track and track No. 1, called the passing-track. His jumper was torn in the back, and it was bloody. An immediate examination of his body disclosed the following: His right arm was broken, the fifth and sixth ribs were broken, a cut was on the right side, about two inches below the armpit and extending below the armpit deep enough, as described, to "put your hand in the gash," the back part of the skull on the right side was mashed, and a cut was on the right cheek. He was last seen alive [fol. 251] about 6:45 p. m. The administrator relies upon circumstances to show that the deceased was struck and killed by a locomotive of appellant's passenger-train called the "Plug", coming from the south and going north and arriving at the Leesville station at that time on its regular schedule time of 7:05 o'clock p. m. If he was not struck and killed by the passenger-train, then there is no testimony to show how the deceased met his death; for the particular passenger-train was the only moving train in the yards, except one freight-engine, between 6:30 p. m. and 7:20 o'clock p. m., and the freight-engine was operating in the extreme lower south part of the yards between 6:45 and 7:20 o'clock. As appears, the appellant was operating a passenger-train, called the "Plug", between Lake Charles and Shreveport, Louisiana. In its regular north bound

trips it was due to reach Leesville at 7:05 o'clock p. m., and in this instance it was running north and arrived on regular time at Leesville. According to the record, this train had been operated only between three and four weeks before the death of deceased. It was shown by the engineer as follows:

"This train, though referred to as an extra, in fact was a regular train, but it had not been put on the regular time-card, and that is the reason it was called an extra. I am not sure how long it had been running, but, to my recollection, it was three or four weeks."

The employees in the yard, including the deceased, knew of the time the train was scheduled to arrive at Leesville, coming from the south and going north. The fireman on the passenger train testified:

"I didn't know anything about Mr. Ferguson being killed at Leesville. I first heard of it at Many, and I noticed blood on the pilot, on the ribs, step and pilot beam. It was on the right step and was red blood. I then went to Shreveport. I didn't notice whether this was fresh or old blood."

[fol. 252] In the latter part of the afternoon and before the passenger-train arrived at Leesville, a freight crew at Leesville was called to make up and carry out a freight-train which was to go north. The cars to be used in the freight-train were to be assembled and placed on the passing-track, No. 1. By or before 6:30 o'clock p. m. the crew of the freight-train had assembled and placed on the passing-track the caboose and fifteen freight cars. Between that time and the time the body of the deceased was found the freight crew were engaged in weighing at the scales certain other freight-cars to be put in the freight-train. The place where the freight-train was being made up was about 1600 feet south from the depot. The scales used for weighing cars are located 500 feet south of the depot yard. Under his employment the deceased was required to inspect the cars making up the freight-train thus being prepared to be taken out, and to couple up the air hose on them. It appears quite clearly that he had been performing this duty up to at least 6 o'clock p. m. He had inspected

the caboose and the string of fifteen cars assembled to that hour. At six o'clock p. m. he went to his home for his evening meal, and returned to his work at 6:20 o'clock p. m. His home was very near his place of work, some two hundred yards distant. He was next seen at 6:45 o'clock p. m. At that moment he was standing at the north end of the string of freight cars then assembled on the passing-track, with his hand on the north end of the last car in the string, and was looking north, which was the direction the freight crew were weighing cars. At the time his lantern was sitting on the ground near the end of this box car. No one saw deceased alive after that very time. At 7:20 o'clock the body was found on the ground. The roadmaster testified:

[fol. 253] "Brakeman Anderson came and notified me that Mr. Ferguson was killed. I went down there immediately. I saw his form in the darkness, and I went a little way to where his lantern was and picked it up and brought it back and looked at Mr. Ferguson. His lantern was setting seventy-seven feet south of his body when I picked it up, or 1600 feet south of the station, and was 4 feet and 8 inches from the east rail of the main line track. I made a measurement of the distances. I noticed a cut of cars there, and the cars were on No. 1 track * * *. The lantern was facing the cars on the side—or passing track. There was a round mark there in the cinders where the bottom of the lamp was sitting. * * * It was about forty feet north of where the lantern was sitting that I saw a piece of flesh, and then from there on to where the body lay I saw evidences of where something had been rolling on the ground. No part of the body got under the train, and no part of it was cut off."

The doctor, after describing the wounds, said:

"I observed the ground where the body lay. I helped to pick him up. Close to where he was lying it appeared like that the body hit—knocked—against the ground and slided—a little further towards the depot."

The main line track is straight, and there is no obstruction to the view of a train approaching the yards and depot. The locomotive of the passenger-train had a brigh-ly burning headlight and was operated through the yards, at the

point where the body was found, at the rate of speed of "twenty or twenty-two miles an hour." The fireman and engineer both testify that they were keeping a lookout on and along the track, and that Mr. Ferguson was not seen by them on or near the track, although they did see the lantern sitting about midway between the main line and passing-track. The locomotive was equipped with a device whereby the light from the headlight may be diminished. It was both the rule and the custom of appellant to keep the headlight burning full power in running a passenger-train on the main line track and going through the yard approaching a station. It was shown to be the rule on several large railroad lines.

In approaching the yards the passenger-train made a great deal of noise. The roar of the train was heard by many of the witnesses long before it reached the point [fol. 254] where the body of the deceased lay. The deceased's own children heard the train approaching for over a mile. It was a quiet Sunday evening, and there was no noise in the yards to distract attention. Several witnesses on the part of the administrator testify that there was a failure to ring the bell or blow the whistle of the locomotive as it was run through the yards to the depot. But a number of witnesses on the part of the appellant testify to hearing the whistle blown and the bell rung. It was admittedly shown to be the practice of trains, and of this particular passenger-train, to ring the bell in passing through the yard. The witness Carlisle testified:

"I was watching this train come in, and it did not blow for the station. I was not watching to hear it blow. You can hear these other trains that come in blow. I have heard them blow, and they make a practice of blowing and ringing the bell. I had seen this train come in before, but it did not ring the bell when it came in this time. I had seen it come in lots of times, and it would ring the bell when it came in. It made a practice of ringing the bell before then —what time I had noticed it—and I have watched it from this same place and other places too."

The engineer of the train testified:

"The bell on that engine was rung in passing through that yard that night. We have an automatic bell-ringer,

and the fireman operates it and I do the whistling. You just start ringing the automatic bell ringers, and they keep ringing until you shut them off. * * * It was necessary to ring the bell as I went through Leesville, to give warning to any people who might be working in the yard. That was the purpose of ringing the bell, so as to sharply attract the attention of the people that might be there and to let them know the train was coming."

The witnesses in behalf of appellant testify that on the afternoon and evening the deceased was killed he was drunk. One of the witnesses saw him as late as six o'clock, and two of them saw him about 5:45 o'clock. One of the witnesses testifies that he drank with him. The children of deceased, and another witness in behalf of the administrator, testify that deceased came home for supper at 6 [fol. 255] o'clock and remained there between twenty and thirty minutes, and that he was not drunk. Other witnesses testify that they had known deceased for a long time, and that he was of sober habits and that they had never known of his drinking and had never seen him take a drink.

The jury made special findings that: (1) There was failure to dim the headlight of the engine as the train approached the place of injury, causing D. R. Ferguson to be blinded, and which failure was an act of negligence proximately causing the death of D. R. Ferguson; (2) that the passenger train was being operated at a rate of speed unusual and dangerous, which was negligence proximately causing the death of D. R. Ferguson; (3) that there was a failure to sound the whistle of the engine, and this was negligence proximately causing the death of D. R. Ferguson; (4) that there was a failure to ring the bell of the engine approaching the place of injury, and that such failure was negligence proximately causing the death of D. R. Ferguson; (5) that the deceased was not intoxicated at the time he was struck and killed; (6) that the deceased was not guilty of contributory negligence "in carelessly, or while intoxicated, placing himself in such position upon or near the main line track that he was struck and killed by an incoming passenger train in the yards on February 12, 1922"; (7) that the deceased did not "by reason of his

employment as car inspector assume the risk of injury such as caused his death." The following two issues were submitted:

"Could D. R. Ferguson, in the exercise of ordinary care for his own safety, and assuming that he *that he* knew the time for the arrival of such train, have discovered the approach of such train in time to have prevented being struck thereby?

Answer. No.

"Could D. R. Ferguson, by the use of ordinary care on his part, have avoided being struck by the locomotive which is alleged to have struck and killed him?

Answer. No."

[fol. 256] The jury made a finding as to the amount of damages.

There is evidence, we conclude, to support the findings of fact as made by the jury; that the passenger-locomotive struck and killed the deceased; that the operatives of the locomotive were guilty of negligence in failing to ring the bell in approaching the station of Leesville through the yards, and that such negligence had causal connection with the death; that the deceased did not assume the risk and danger of being struck and killed by the locomotive under the circumstances. It was admittedly proven that it was the practice to keep the bell ringing in going through the yard, and that, as found by the jury, the bell was not rung in this instance. The deceased had the right to rely upon such practice. We further conclude that the evidence does not warrant the finding as made by the jury: that the efficient cause of the death was the failure to diminish the light of the headlight or the speed of the train at the time, or the failure to blow the whistle; that the deceased was using due care under all the circumstances. The deceased was not on the main line track. He was outside the rails of the main line track, but near enough to the outside rail to be struck by the pilot beam of the engine. He was not facing the approaching locomotive and was not blinded by the headlight and confused as to his whereabouts. All the circumstances point to the fact that he contributed to the cause of his death by knowingly remaining in a position to

be struck by a train which he had reason to expect, and the glare of the headlight and the rattle of which he could have seen and heard when it was some distance away. Each issue of negligence was separately submitted and found by the jury to be a distinctive act of negligence.

[fol. 257] (After Stating the Case as Above)

The propositions of appellant in effect present the three points in view that the evidence speaks unequivocally (1) of the lack of any negligence on the part of appellant proximately causing the death of D. R. Ferguson; (2) of the negligence of the deceased at the time of injury which wholly or partly resulted in his death; and (3) of assumed risk by the deceased of injury from the regular train running on the main line on schedule time, the deceased being familiar with the time the train was due, and he having no duties to perform at the time on the main line track. The fact can be conceded that the deceased was struck and killed by the passenger-locomotive as it was going through the yard to the depot. The inference from the circumstances is quite clear that the train killed him. Yet it is apparent from the evidence that an occasion of blame for the death cannot be predicated upon running the train at a high rate of speed or in not diminishing the light of the headlight while going through the yard. Neither ground of such alleged negligence, distinctly plead and relied upon, was the efficient cause of the injury and death, in the sense that the death would not have occurred without such negligence. It is clear that the deceased was not on the main line track at the time he was struck. The physical injuries on his body disclose that no part of his body was cut off by the wheels, which necessarily would have resulted had he been in the direct pathway of the locomotive. And it is equally as clear, as indicated by the injuries on his body and the blood-spots on the step of the pilot, that the deceased was sitting on or squatting near [fol. 258] the outer ends of the ties from the east rail of the main line track, and that he was not standing on his feet erect. He was performing no duties on the main line track. It is plain that the deceased was facing east or northeast. The train was coming from the south. Under such

circumstances it would be an unwarranted assumption that the deceased was blinded by the headlight and so confused as to his whereabouts as to step in the direction of the train without knowing it, or that the speed of the train, of itself and by itself, wholly or partially caused the injury. It is true that the locomotive was equipped with the regulation headlight, in compliance with the order of the Interstate Commerce Commission, and that the light of the headlight was not diminished in going through the yard. Under the terms of the said regulation it is not per se a violation of such order to fail to dim the headlight, but it becomes negligence vel non according to the circumstances of each case. And assuming it to become an act of negligence in this case to fail to dim the light, such negligence was not the proximate cause, under the evidence and the physical circumstances, of the injury and death. We think it conclusively so appears. There is not, however, an entire absence of evidence of negligent failure to ring the bell as the train was going through the yard. At least the doubtful condition of the evidence requires the question, in legal contemplation, to be left to the jury, and not determined as a matter of law by this court. It was the practice to ring the bell in going through the yards, and the deceased had the right to rely upon the practice; and there was failure to ring the bell, as found by the jury, in this instance. Such negligence could be regarded as a proximate cause of the injury and death.

[fol. 259] We next inquire as to what support there is for the finding as to the deceased's own care or caution under all the circumstances. The last time he was seen alive was at 6:45 o'clock p. m. At that time he was standing at the north end of the string of cars then assembled on the passing-track, with his hand on the north end of the last car in the string. His lantern was sitting on the ground near the end of this box car, and he was facing north. This was 20 minutes before the passenger-train arrived. As seems evident, during these twenty minutes he was not performing any duty there, although expecting more cars to be ultimately brought up to go in the train being made up. He was not engaged in inspecting the cars and in coupling them, as that work had been done as to the string of cars assembled. He was waiting for more cars to be brought

there. The freight crew were still weighing cars at the scales. And the manner in which and the fact that he was hit by the locomotive indicates that he did not remain standing near the end of the box car, but that he moved back nearer to the main line track and there sat down on or squatted near the ends of the ties. His injuries were entirely on the back of the head and the rear of the right side near the armpit and not below the sixth rib. The blood on the locomotive was "on the pilot, on the ribs, and right step, and the pilot beam." The deceased was five feet and nine inches tall, and there was no injury to his body below the sixth rib. The step on the pilot, which reached to the height to do so, evidently cut the deep gash in the rear of his right side near the armpit, and the pilot beam evidently struck and mashed the skull on the rear of the right side. That the deceased knew, as did the other yard men, that the passenger-train was likely to pass at 7:05 o'clock, and that it was about that hour when he assumed that position near the track, is not open to question. It was not a proper [fol. 260] place to be. It is shown that the roar of the train was great. His children at the home, not more than two hundred yards distant from him, heard the roar for half a mile away. Others heard it. It was affirmatively shown that it was a quiet Sunday night, with no noise in the yards. It does not appear that the wind was blowing. It was not shown that deceased's hearing was not good, so that he could not hear the roar of the approaching train. The headlight, too, was casting a bright light ahead 700 or 800 feet. He had ample opportunity to acquaint himself with the peril incident to the situation which led to his being injured. Then why did he remain so near the track after he could hear the train and see the light in ample time to step away? The law devolves this duty on the deceased, and there is really nothing to explain such conduct or excuse the failure to use due care to leave the position of peril incident to the situation near the main line. He could not have been in a better position to hear the approaching train. The same is true with reference to his seeing the light. We must assume, in the absence of evidence to the contrary, that deceased was possessed of normal hearing and sight. If he had exercised either faculty, as it was his duty to do, he could easily have heard or seen that train in time to get

away from such close proximity to it. If he did not hear or see it, it was solely because he was not in the least attentive. It is pure conjecture that the deceased thought he was in safe distance from the approaching train. We think the facts of the case clearly overcome any presumption arising from the rule as to instinct of self-preservation. We are not disposed to deny to the deceased the benefit of that rule, so often announced, that the jury may assume from the instinct of self-preservation that a person is diligent to escape injury. But in each of the cases the injury happened when the person was intently engaged at the [fol. 261] moment in the line of employment; and in some, if not all of them, his conduct is traced so closely to the accident that from it, aided by a presumption that arises from a natural disposition to avoid injury, the fact of diligence could well be founded. This is not the situation of this case, and the circumstances are not as favorable as that for the deceased. The deceased failed to use any diligence to get away from the approaching train, having time to do so; and a judicial finding to the contrary is not warranted. Therefore in determining the result of the case it is essential to view the conduct of the railway company and of the deceased as a whole, and note the bearing the acts of each had upon the resultant injury. The negligence of the railway company, as could be found by the jury, in failing to ring the bell, as customarily done, was not the sole cause, but a concurring cause of the injury. The negligence of the deceased contributed to his injury. Hence the injury was partly the result of the negligence of the company and of the negligence of the deceased; the legal consequence being, as they each were in fault, the amount of recovery should be diminished, as that is the legal effect of contributory negligence. The present verdict is then excessive, as no deduction of amount was made by the jury. This court can not direct a remittitur, since the parties to the suit are entitled to a jury finding in that respect. It is incumbent upon this court to remand the cause in such situation.

As to the third proposition, we conclude that assumed risk is not applicable in the circumstances, in the view that the only actionable negligence was the failure to ring the bell as was customarily done. Even if the deceased could

be held to have assumed the risk from the operation of the train, on account of his knowledge of the schedule time of its arrival, he can not be said to have assumed the addi-[fol. 262] tional risk caused by failure to follow the customary practice of ringing the bell.

The judgment is reversed and the cause is remanded for another trial.

Levy, Associate Justice.

Feb. 11, 1926.

[File endorsement omitted.]

In Court of Civil Appeals

[Title omitted]

Judgment—February 11, 1926

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinon of the court that there was error in the judgment, is it therefore considered, adjudged and ordered that the judgment of the Court below be reversed and the cause remanded for further proceedings in accordance with the opinion of this court; that the appellee Leonard Jones, Administrator, pay all cost of this appeal. It is further ordered by the Court that the officers of this coart and the [fol. 263] court below recover from the appellant, the Kansas City Southern Railway Company and of the American Surety Company of New York, surety upon appellant's supersedeas bond, all cost incurred by said appellant in this appeal, for all of which execution may issue and this decision be certified below for observance.

In Court of Civil Appeals

[Title omitted]

Motion for Rehearing of L. Jones, Admr.—Filed February 25, 1926; in Supreme Court December 8, 1926

To the Honorable Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana, Texas:

Now comes appellee, Leonard Jones, Administrator, in the above cause, and moves the Court to set aside the judgment heretofore rendered in this cause reversing the judgment of the trial court and remanding the case to the trial court for new trial, for the reasons herein set forth:

[fol. 264] Foreword

We call to the attention of the Court two most important erroneous holdings of the Court, and for which, it seems to us, the Court must inevitably grant a rehearing and affirm the case, before presenting in detail and consecutive order the several errors which we sincerely believe the Court has made.

We feel that we can positively demonstrate (and if we can, we know that we will get relief) that the Court has seriously erred to our injury in the two particulars referred to in this brief synopsis.

First. The Court erroneously concluded, as a fact, that Ferguson was guilty of contributory negligence, and erroneously held, as a matter of law, that in getting or being in a position to be struck by the train, he was guilty of contributory negligence.

Second. The Court erroneously finds that there was not sufficient evidence to support the jury verdict that Ferguson was blinded by the light, which proximately contributed to his injury; or, in other words, that the confessed violation of the safety appliance regulations in regard to the light was found by the court not to be a proximate contributing cause of his death.

In presenting these contentions, we say at the outset that we will demonstrate beyond the possibility of a doubt that the wound to Ferguson's torso could not have been caused by the pilot beam step for the reason that if his body was in such position as for that injury to have been inflicted by the pilot beam step, the pilot beam would have passed over the top of his head by ten inches or more, and no blood could have been placed on the pilot beam from his [fol. 265] body; and that the only logical conclusion that can be reached is that the end of the pilot beam inflicted the injury to his torso, and caused the blood to be on the pilot beam, and that it spattered from there downward on the pilot and the step; or, that, after being struck by the pilot beam, his body may have been caught by the step and dragged or rolled.

In approaching a consideration of the rights of the parties in this case, we cannot dismiss from our minds the fact that for twelve long years Ferguson had discharged his duties in this yard and had avoided injury from the careful operation of trains, and probably many times, from the careless operation thereof, through the yard. That regardless of whether we say that he was last seen alive by the Barnhill boy and others at six-forty-five, or whether he was last seen alive by Mr. Thorla, a very few minutes before he was killed, it is clear that the testimony of all of these witnesses showed that he was faithfully discharging his duties when last seen. If he was last seen alive by Mr. Thorla, only a few minutes before his death, he was traveling north alongside the string of standing cars that was to form a part of the train that was then being made up.

The appellee now presents his propositions, statements, arguments and reasons to show that the Court has erred in reversing and reman-ing this cause.

I

Because the Court of Civil Appeals erred in holding that the finding of the jury that deceased, D. R. Ferguson, was not guilty of contributory negligence was not supported by [fol. 266] the evidence, and in finding as a matter of fact that D. R. Ferguson was guilty of contributory negligence as a matter of law and of fact, in that he was not engaged

in his work up to the moment of his death; and that at the time he was struck by the locomotive, that D. R. Ferguson was sitting or squatting near the ends of the ties on the east side of the main line. This finding is not only contradicted by circumstances, but it is contradicted by direct evidence.

Statement and Argument

The Court holds:

"* * * It is equally as clear, as indicated by the injuries on his (Ferguson's) body and the blood spots on the steps of the pilot, that the deceased was sitting on or squatting near the outer ends of the ties from the east rail of the main line track, and that he was not standing on his feet erect."

The engineer and the fireman both testified unqualifiedly that they were keeping a sharp lookout until the engine passed the lantern, and did not see any object on the track or between the tracks (S. F. 84,89,96-97, this motion p. 11). This evidence was uncontradicted. If Ferguson had been on or near the track, they must have seen him. It is conclusive that he must have stepped from between two cars or from the end of the string of cars after the engine had gotten so close to the place where he was struck that the front end thereof hid him from view.

The testimony of Dr. F. P. Jones (S. F. 80-81) showed that Ferguson's body showed a large hole in his side right at the arm-pit, that his right arm was broken about two-thirds of the way towards the shoulder joint, and that his skull was fractured. There was blood upon the pilot beam and upon the ribs and steps of the pilot.

[fol. 267] The Court then finds from this set of circumstances, i. e., the point at which Ferguson's body was struck and the portions of the locomotive upon which blood was found, that Ferguson must have been sitting or squatting when he was struck. Ferguson was five feet eight and one-half inches or five feet nine inches tall (S. F. 81).

The pilot beam of the engine in question was described by the engineer as follows:

"I judge that pilot beam is something about three and a half feet above the track, and the beam is about ten or twelve inches thick" (S. F. 85).

The height of the main line rail is five and seven thirty-seconds inches (R. T. Huson, S. F. 76), approximately six inches; thus, the bottom of the pilot beam would be four feet above the top of the cross ties.

The fireman of the locomotive which struck and killed D. R. Ferguson, testified:

"* * * I said I saw blood on the pilot beam, on the ribs, of the pilot or cow catcher and on the step on the right side of the engine. The blood was all over the pilot beam, scattered different places and in spots, on the right hand end of it, that is the engineer's side of the engine, it was all over the end of it, scattered around in different places, on the front of it, I didn't notice whether there was any on the end of it or not, but I saw quite a bit of it on the front, a considerable bit of blood in several places, on the ribs of the pilot there was some blood, and on the steps, on the right hand, below the end of the pilot there was quite a quantity of blood" (S. F. 44-45).

The logicial conclusion to be drawn from this testimony, it seems to us, is this: That the pilot beam of the engine struck Ferguson, since it is the highest part of the engine upon which blood stains were found; that the blood found upon the ribs of the pilot and the step of the pilot ran down from the injured body of deceased to the pilot and pilot step, since blood, like water, runs down-hill when freed.

[fol. 268] We dislike to stray from the record, but as the Court has concluded that Ferguson was struck by the step on the pilot, we feel that we are justified in pointing out that the pilot sill-step is bolted to the bottom of the pilot beam and is never more than sixteen inches above the rail. (Safety Appliance Standards for Locomotives, Order of Interstate Commerce Commission, March 13, 1911).

Realizing that the step could not have been more than sixteen inches above the top of the rail, and therefore not more than twenty-two inches above the top of the ties, and therefore not more than twenty-six inches above the top of

the ground, anyone is driven to the inevitable conclusion that the train could not have inflicted the injury upon Ferguson by the pilot step first striking his torso, or by its striking his torso at any time and the same collision placing blood upon the pilot beam. Figure it as you will, if the step cut the wound in his torso, no part of his body could possibly have been struck by the pilot beam, for the top of his head could not have been more than sixteen inches above the step, and there was a clearance between the step and the bottom of the pilot beam of twenty-six inches; or in other words, if the step cut the hole in his torso, the pilot beam would have passed ten inches above the top of his head. This is clearly demonstrable by the following calculation:

There was a clearance of three and one-half feet or forty-two inches between the bottom of the pilot beam and the top of the rail. The extreme height of the step as permitted by the safety appliance regulations is sixteen inches, leaving a clearance between the pilot beam step and the bottom of the pilot beam of twenty-six inches; and if we assume that Ferguson was a man of ordinary build, there [fol. 269] could not have been an extension of his body from the wound in his torso to the top of his head of more than sixteen inches. You cannot imagine a man five feet eight inches tall of such build as that there would have been an extension of his body amounting to some thirty inches above his arm-pit. No part of his body could have possibly come in contact with the pilot beam and no blood could have been placed on the pilot beam by a collision in which the step cut the hole in his torso.

It thus appears that the conclusion of the Court of Civil Appeals that Ferguson was sitting down or squatting when he was killed is directly contradicted by the testimony of the engineer and the fireman of the train which struck Ferguson. As the bottom of the pilot beam was three and one-half feet from the rail, and as the pilot beam was ten or twelve inches thick, and as the rail is approximately six inches high, it is clear that the pilot beam would have completely passed over the man if he had been sitting or squatting near the ends of the ties. For a man who is five feet nine inches tall, to give him his full height, would not have a body or torso of such length as to extend upward

a distance of four and one-half feet, which would be necessary for the center of the pilot beam to strike the top of his head. It seems to us that the evidence points clearly to this: That, as the pilot beam is four feet ten inches or five feet from the ground, i. e., the top of the pilot beam, it was at just about the right height to inflict the injury upon Ferguson's torso when he was standing; as the bottom of the pilot beam was three and one-half feet above the rail, and as the rail is approximately six inches high, it is obvious that a man whose height is five feet nine inches could sit on the end of a tie and escape injury from the pilot beam. The blood on the pilot beam cannot be accounted for in any way other than that he was standing and the beam struck his body.

[fol. 270] We believe that we can point out with such clearness that the Court has erred in holding that Ferguson was squatting or sitting on the track, and that he was struck by the step of the engine, and was guilty of contributory negligence as a matter of law, as to demonstrate such error of the Court in so holding.

The writer knows no better way than a crude but apt illustration. The writer is five feet eight and a fourth inches tall. Sitting erect, the top of his head is just thirty-one inches above the object upon which he sits. Allowing a little for natural slump while sitting in an erect position, it is safe to say that the extreme height—the top of an average man's head of such height while sitting—is thirty inches above the object on which he sits. Realizing that there is a clearance of three and one-half feet or of forty-two inches between the bottom of the pilot beam, and the top of the rail; and that deceased could not have sat on the rail without being ground into mince-meat, and that the rail is approximately six inches high, we have a clearance of forty-eight inches between the bottom of the pilot beam and the top of the tie.

It required no imagination whatever to conclude—in fact, the testimony conclusively shows—that the pilot beam would have passed eighteen inches above the top of this man's head had he been sitting on the end of the ties. Therefore, it is absolutely certain that he was not sitting on the end of the ties.

Again, the Court argues that the blood on the end of the pilot beam was caused by the pilot beam striking the back

of Ferguson's head and crushing his skull. There is no warrant for this conclusion, for there is not a particle of evidence in the record, and I believe that the record in fact [fol. 271] negatives the theory that there was any break in the skin of the head or anything that would have permitted his blood to have flown therefrom, except the small cut on his face evidently caused by his body being rolled or dragged after it had been knocked forward and struck again by the train or dragged with the movement of the train. Certainly, this Court cannot piece out the defense of contributory negligence by assuming in the absence of evidence that there was a cut or break of the skin on his head from which blood escaped, as the burden was upon the appellant to show such contributory negligence.

Following the process of elimination and of calculation, we find that the arm-pit of a man standing erect, i. e., a man five feet eight inches tall, would be between forty-six and fifty-two inches above the ground. Then, follow up our calculation, and what do we have? Allow six inches for the width of a tie, six inches for the height of a rail, three and one-half feet clearance between the bottom of the pilot beam and the top of the rail, and we have a clearance of four feet and six inches between the bottom of the pilot beam and the ground at the end of the ties—just the proper height for the end of the pilot beam to have inflicted the injury to Ferguson's torso (knocked a hole in his body) and account for the blood on the pilot beam. These—if no other—ways in which the blood got on the pilot beam can be accounted for. This also accounts for the blood spattering downward and being found on the ribs of the pilot, and on the steps of the pilot beam. The crushing of the skull is easily accounted for by the body being thrown against the end of a cross-tie or the ground with such force as to crush the skull.

In view of the fact that we have a logical explanation disclosed by the testimony that points inevitably to the con- [fol. 272] clusion that the end of the pilot beam crushed the hole in his body, and that it has never been seriously contended by anyone until this Court advances the thought that he was struck first by the step and the hole cut in his body and his head struck by the pilot beam, we are driven to the inevitable conclusion that he must have been struck by the pilot beam which inflicted the injury to his torso,

and the further conclusion that his injuries could not have occurred in any other way.

The conclusion that Ferguson was sitting or squatting near the end of the ties is again positively contradicted by the testimony of the engineer, who said:

"In going through that yard, I was keeping a lookout. * * * I did not see Mr. Ferguson or any other man on or near the tracks in going through the yards that night. I did see a lantern in the yard there at Leesville. I saw a car repairer's lamp sitting on the ground between the tracks, between the main line track and track No. One, supposed to be the passing track, but I did not see Mr. Ferguson or any other man there about the lantern, no man about this light whatever. * * * I can see the ground within a few feet of the end of the pilot" (S. F. 84).

"As I went from Staples to Leesville, I did not see anybody between Staples and Leesville." (S. F. 89.)

The fireman testified:

"I was keeping a watch ahead in going through Leesville that night, but I did not see any man on the tracks or near the tracks as we were passing through the yards. The headlight was giving a good light, so that I could see along the track, through the yard there. I saw a lantern as I went through the yard there, between the main line and the passing track." (S. F. 96.)

He testified further:

"I was about between a quarter and a half a mile from this inspector's light when I first saw it. The engineer could see it about as far as I could, one could see it as far as the other. I went right on by it and into the station and did not see anybody." (S. F. 97.)

[fol. 273] The above quoted testimony (which was not contradicted) shows, it seems to us, that if Ferguson had been sitting or squatting on the ends of the ties or near the ends of the ties, that the engineer and fireman would most certainly have seen him. They were keeping a lookout, according to their testimony, and a very careful lookout, if they are to be believed, and the jury had the right to believe this part of their evidence, for they saw the lantern

a distance of a quarter of a mile before they reached it. Certainly, if they saw the lantern for that distance, if a man had been sitting or squatting on the ties or near the ties, they must have seen him, as a dark object is more readily seen in a bright light than is another and weaker light. The evidence was so conclusive that Ferguson was not in a position to be seen as the train approached that neither plaintiff nor defendant requested a finding as to whether the engineer or fireman should have seen him.

We respectfully submit that in view of the above undisputed testimony and the circumstances of Ferguson's death as shown from the injuries found on his body and the blood on the pilot beam of the locomotive, that the Court is in error in holding that he was struck while sitting or squatting near the outer ends of the ties from the east line of the main line track, and that he was not standing on his feet erect.

We respectfully ask this Court to step and summarize: The uncontroverted evidence shows that Ferguson was not sitting or squatting on the track until the engine got so close that it interfered with the view of the engineer and the fireman. The same evidence shows he was not between the tracks until they got very near the place where he was [fol. 274] struck. The physical facts show that the injury to his body could not have been inflicted by the pilot step and his blood stain the pilot beam, for such beam would have passed more than ten inches over his head. The height of the man, the location of the blow and the relative height of the pilot beam and other physical facts, such as it being slightly down grade from the main line toward the side track, show that the wound on his body could have been caused only by the pilot beam striking him while in an erect position between the tracks.

These facts also authorized, if indeed they did not require, the jury to find that Ferguson was between two cars and stepped therefrom and, by reason of the bell not ringing or by reason of being blinded by the light, more likely by both, he was deceived as to his position and the danger that threatened him; and, turning his face away from the bright light in an effort to get his bearings and discover his locality and avoid danger, he got in the path of the pilot beam and was struck and the injuries that caused his death inflicted upon him.

There has never been any contention in this case that Ferguson would have been guilty of contributory negligence in getting on the main line track—in fact, there was positive testimony that it was usual and customary to get on said track in the performance of his duties. See testimony of the witness Nick Franklin (S. F. 72-73), where he says:

"As to the habit and practice of an inspector who inspected trains that were being made up at night in the yards of the Kansas City Southern Railway at Leesville, on and prior to February 12, 1923, with reference to moving away from the opening between cars after coupling the air hose and inspecting the safety appliances, and the dis-[fol. 275] tance that they would move away from the car after having made said inspection, he would step back in the clear from the train that was being made up; I would say that he would ordinarily move back several feet, maybe two, or three or four feet. A person making the inspection of a train that way, would move away from the standing cars about two, or three or four feet, step back in the clear, several feet, that is, the practice and habits of the inspectors. With reference to the distance between the main line and the passing track where Ferguson was killed that inspectors were in the habit of moving from the cars, in stepping away from them, the main track and the switch track are right there close together, and when you stepped back from the switch after making an inspection, you would step back close to the main line."

In fact, the appellant so alleged the facts to be in its answer (bottom of p. 13, Transcript, Section 5, Appellant's Answer).

Suppose it be conceded (which we do not and can not concede, for it is contrary to the undisputed evidence and contradicted by the physical facts) that, as found by the Court, Ferguson was sitting on the end of a crosstie waiting for more cars; and that, owing to the failure to ring the bell, Ferguson was not apprised of the near approach of the train (and we may add, by reason of the glaring headlight and the extra speed of the train) until he was struck, or that he endeavored to get away from the track and by reason of being thus misled, he was struck and killed; it does not follow as a conclusion of law that such conduct

constituted contributory negligence. To concede everything possible in favor of the appellant, there is nothing in the record to show nor is there any reason that can be advanced to argue that Ferguson would have been guilty of any wrong in temporarily resting on the end of a tie; for, as announced in the case of Harvey vs. Texas & Pacific Ry. Co., 166 Fed. 385; 92 C. C. A., 237, he was in the master's service, present to perform his duty, although at the given moment he was not engaged in the actual per [fol. 276] formance of any work: "They also serve who only stand and wait."

II

This Court erroneously found that there was not sufficient evidence to support the jury verdict that Ferguson was blinded by the light which proximately contributed to his injury; or, in other words, in finding that the confessed violation of the safety appliance regulations in regard to the light was a proximate, contributing cause of Ferguson's injury and death.

This was error because there was sufficient evidence to justify the jury in finding that Ferguson was in a position on or near the track and, being blinded by the light, attempted to get away from the danger, and was confused to such an extent that in turning from the light, he failed to get away from the danger; also, that Ferguson came from between the cars and was blinded by the light, and in his confusion, turned from the light and brought his body in a position to be struck by the pilot beam.

This Court erred in holding the presumption that deceased exercised due care is only applicable to cases where the evidence shows he was exercising such care up to the time of injury.

We ask the Court to carefully consider our presentation of their proposition, for we necessarily further discuss the error committed by this Court in holding that the injury to Ferguson's torso was caused by being struck by the step.

Statement, Authorities and Argument

The Court holds:

[fol. 277] "It is plain that the deceased was facing east or northeast. The train was coming from the south. Un-

der such circumstances, it would be an unwarranted assumption that the deceased was blinded by the headlight and so confused as to his whereabouts as to step in the direction of the train without knowing it, or that the speed of the train of itself and by itself, wholly or partially caused the injury."

We think that this finding of the Court is not supported by the evidence. It is true that the circumstances indicate that Ferguson was facing east or northeast when struck, but there is utterly nothing to show in which direction Ferguson was facing just the instant before he was struck. It seems to us that the only logical conclusion which can be reached is that Ferguson was binded by the intensely brilliant headlight as he stepped from between the cars, and that either he suddenly realized his dangerous position and faced away from the train as he was struck, or that he had faced away from it in an effort to regain his bearings. We believe that a careful consideration of the testimony relative to Ferguson's activities just preceding his death will convince the Court that it is in error in holding that Ferguson was guilty of contributory negligence under the circumstances. Certainly, we believe that the Court will not say, in view of the facts in this case, that Ferguson was guilty of contributory negligence as a matter of law.

The Court holds:

"He (Ferguson) was next seen at six-forty-five o'clock p. m. At that moment, he was standing at the north end of a string of freight cars then assembled on the passing track, with his hand on the north end of the last car in the string, and was looking north, which was the direction the freight crew were weighing cars. At the time, his lantern was sitting on the ground near the end of this box car. No one saw deceased alive after that time."

[fol. 278] We respectfully call the Court's attention to the fact that it is in error here. A. H. Thorla testified:

"When I go to my home to my daughter's I travel north, up the street to Mr. Dawkins' residence, and then across the railroad yards, northwest. Where I went across the yards carried me something like three blocks down south

of the depot at Leesville where I strike the railroad". (S. F. 65.)

His daughter lives due west of the depot, in the middle of the second block from the depot. He testified that he crossed the track going west; that he saw some cars on the track next to the main line track; that they extended back south of where he was; that he passed the north end of that string of cars.

"As to how close to the north car I passed it was thirty or forty feet; * * * When I passed that car that I spoke of I saw Mr. Ferguson walking around there. With reference to that car, he was next to the track, like he was coming right along the track, right at the main line, about that first line of cars; he was facing north coming towards me, but I was traveling pretty fast, and I went on; Mr. Ferguson was right about the end of those cars when I saw him; he had a lantern in his hand. After I saw him there I went to my daughter's; I went right straight to my daughter's; in going to my daughter's, I went up by the depot and turned off and went up to her house, I turned to the left and went to her house. In going from the depot to her house I went a block and a half. Between the time that I last saw Mr. Ferguson and the time I got to my daughter's house I never did stop; when the passenger train came in from Lake Charles that night I had just got on the porch at her house; when I got on the porch I didn't see the train, I heard it coming in; that is the length of time that passed." S. F. 65-66)

It appears from the above testimony that Thorla was the last person who saw Ferguson alive, and that he saw him about the cars where he was supposed to be working just before the passenger train which struck and killed him came into the yards, as Thorla, who says that he was going [fol. 279] "pretty fast", barely had time to walk four block and a half between the time he passed Ferguson and the time the train came into the yards.

The Court holds that Ferguson was last seen alive twenty minutes before the passenger train arrived. It further holds:

"As seems evident, during these twenty minutes he was not performing any duty there, although expecting more

cars to be ultimately brought there to go into the train being made up. He was not engaged in inspecting the cars and in coupling them, as that work had been done as to the string of cars assembled. He was waiting for more cars to be brought there. The freight crew were still weighing cars at the scale.'

The court has unintentionally and erroneously assumed that it affirmatively appears in the testimony that the fifteen cars which were standing on the track after Ferguson's body was discovered, were standing there for a long time prior to the time the passenger train came in. This is not supported by the evidence, as we shall now point out. J. C. Miller, who was the fireman of the engine which was making up the freight train which Ferguson was inspecting, testified:

"As to what my engine was doing at the time the passenger train came in, we had been weighing cars, but I don't know for sure whether we *just* pulled out of the scale tracks or whether we were standing still at the time, I don't know for sure whether I had finished my work or not. * * * As I would weigh a car I would send them on down to track No. One, or the track next to the main line, as you would weigh a car you would cut it off of the scales and get another one, *and shove it on down that way.*" (S. F. 128-129) (Italics ours)

Nick Franklin, the car inspector who followed Ferguson, testified:

"Q. Now, in making up a train in the yard as the train was being made up on this track that night, what was the customary way in which the inspector would perform his work? We will say, for instance, that the caboose and three or four cars were set in on the south, as the train was [fol. 280] going north, on the south end of the track to which you were going to build the train—now, where would the inspector be with reference to those first cars, would he get to them?

A. Yes, sir, he would go to the first cars put in there and couple them up and inspect them, and as car after car came in, after they later set in two more cars and coupled on the three already there, for instance, the inspector would couple up the air on them and inspect them as he would

put them in there. Generally he would go one side and inspect them as they were going in there, and as they finished up the train he would go down the other side, but there was no fixed rule that would keep him from going over and looking at the other side while he was waiting for other cars; he did it in the most expeditious way, owing to the speed the cars were being put in. The inspector would make light repairs, if he found light defects, he would repair them, and then in the process of his work he would keep on building the train up as I have described until it was finished. In inspecting the cars or coupling up the air where cars are put in, like these books, say towards you is a bunch of cars already connected up, and the air coupled up, and one or two or more come in and are coupled into this string of cars, ordinarily he would start to doing his work at this first one, he would start at the hind end of them and keep coming on up as they coupled on. As two or three more cars came in and were coupled up he would couple the air hose as this place. He would have to go in between to couple the hose; he would not necessarily have to go in there to inspect the knuckles and appliances to see if everything was all right, only to couple the air, and after coupling the air he would go to the next place and perform the same work and make the same inspection and keep that up until he would get to the end of those cars, and then he would stand around there and wait for more cars, his place would be at or about that end of the train." (S. F. 34-35)

T. H. Burke, the conductor of the freight train which was being made up at the time Ferguson was killed, testified:

"The scale track is not a part of the main line track, it is just called the scale track and it comes out right above the depot and runs down parallel with the main line, and comes into No. One track—all the same as No. One track, only the north end is called the scale track. As we weighed these cars we would push them off, shove them back, one at the time, and we had about eighteen cars hooked onto the engine. We weighed the last one away from the engine first, and then as we weighed it we turned it loose and shoved another one on at the same time". (S. F. 133)

[fol. 281] It appears from the above quoted testimony, that the method or manner of making up this train was to place the caboose on the south end of the track and then as the cars were weighed to shove them on down to connect with the caboose, one at a time or two at a time as they got them weighed. All of the members of the crew which was engaged in making up the freight train, testified that they were weighing cars and shoving them off up until the time the passenger train came in and after it came in. Therefore, we think that the conclusion of the Court that the fifteen cars which were found to be properly inspected after Ferguson's death were all placed in the track before, and some time before, the passenger train came in is erroneous and clearly not supported by the evidence; but, if they had been there several minutes, it does not follow as a conclusion of fact that Ferguson did not leave the end of the string and go back to the caboose, or go between two cars of that cut in the regular discharge of his duties, such as replacing an air hose or making light repairs, and while coming from between the cars, he received the injury.

While it may be impossible to say definitely just what his mission was at the time Mr. Thorla saw him walking alongside those cars, it is not unreasonable to conclude that additional cars had been switched in onto this train that was being made up after the Barnhill and other boys left Ferguson; and that he had found some little defect in the air hose connection at some point between those cars, or between the cars that had already been placed on the track when the Barnhill boy and others saw him; and that he had gone to some place to secure the necessary supplies for making repairs, possibly securing a piece of hose to [fol. 282] supply the connection, and when Mr. Thorla saw him, he was traveling to a place where he would use the same in making the necessary repairs; and that he, in fact, passed between two cars and made the repairs; and that he stepped backward from such place, and in doing so, being blinded by the headlight or not being warned of the near approach of the train by the bell ringing, or by reason of both conditions, he made a mistake and stepped in the path of the oncoming train. In such case, it cannot be said that the headlight did not confuse him; nor can it be said that the failure to ring the bell was not the proxi

mate cause of the injury; nor can it be said that he was guilty of contributory negligence as a matter of law under the existing circumstances.

It must be borne in mind, as clearly appears from an examination of the rules and regulations of the Interstate Commerce Commission, that the portions of cars covered by the safety appliance legislation, are of such nature that repairs thereto may be easily and readily made. For instance, the air line on the cars consists of iron pipes, and at the end of cars, with hose connections thereto, which are easily detachable and can be readily replaced by one man in a few seconds. The knuckle of the coupler and the pin are small parts easily removed and replaced with new ones. It was the duty of Ferguson to make such repairs; and inasmuch as the jury had the right to believe the testimony of the fireman and engineer with reference to keeping a lookout, and inasmuch as this Court cannot assume that they testified falsely when they testified that they did not see Ferguson by keeping a lookout, the situation is strongly suggestive—and especially when considered in connection with the testimony of Mr. Thorla and the manner in which Ferguson was injured—that he had been between the cars for some purpose; and that he somewhat suddenly stepped out from that position and came in the [fol. 283] path of the oncoming train. This Court—in fact, the jury—would not be warranted in saying that while he was between the cars, the noise of the engine that was handling the cars that were making up his train, together with the fact that the oncoming train was not giving the usual warning by ringing the bell which would sharply attract his attention to its nearness, was not sufficient to excuse him for not knowing of the close proximity of the train when he stepped out from between the cars; and certainly the blinding effect of the headlight as described by so many witnesses was such that this Court cannot afford to say that he was not blinded by it and did not turn away from it or try to get away from the danger that he felt it threatened him with, and in doing so, staggered or stepped in the path of the oncoming train and received the injuries that resulted in his death.

We think that an examination of this evidence shows that Ferguson was working right up to the time the passenger train came in, and that it certainly warrants the conclusion that he was engaged in inspecting a car just a few seconds before his death; but even if he had not been engaged in inspecting, he was shown to have been in the proper place for his work to have been done a very short time before he was killed, from the testimony of the witness Thoria, and as he was not conclusively shown to have been negligent, we think that the Court has committed a very serious error in holding, without proof to sustain such holding, that Ferguson was guilty of contributory negligence as a matter of law.

The Court says that the presumption that a person killed by the negligence of another was not guilty of contributory negligence, should only be entertained when the one for whose benefit it is sought to invoke the presumption "was intently engaged at the moment in the line of employ- [fol. 284] ment." We do not believe that to be the law, but if in fact it is, we think that the evidence above quoted shows as positively as it is possible for it to be shown without an actual eye witness of the death, that deceased, D. R. Ferguson, was engaged at the moment of his death in the line of his employment.

It is our understanding of the law that the reason for this presumption in favor of the dead man is not because he is shown to have been engaged in a task which showed him not guilty of contributory negligence, for in that event, he would not need any presumption; the only sensible reason for allowing a presumption of care on the part of one killed by the negligence of another is to leave the burden of proving such affirmative defense where it belongs—upon the party guilty of the negligent act, and offering the affirmative defense of contributory negligence. The fact that the party in whose favor the presumption exists is dead and cannot refute the testimony of the injuring party is the reason for the presumption. It has been held, time after time, by every court in the country, that this presumption can only be overcome by direct proof to the contrary; and we cannot believe that this court, which is so jealous of the rights of parties before it, will ever let a contrary holding stand over its signature.

We earnestly request this Court to carefully examine the testimony above quoted and to consider it in relation to the circumstances of this case, and we believe that such consideration will convince the Court of the grave error that has been committed, and of the burden which will be placed upon parties plaintiff in the future if this opinion is allowed to stand.

[fol. 285] In Texas and in the Federal Courts, the burden of proving contributory negligence is upon the defendant.

"In the great majority of American States, the burden of proving the existence of contributory negligence rests on the defendant. This rule has been explicitly affirmed in the following employers' liability cases." (Citing many cases.) La Batt's Master & Servant, Vol. 4, Sec. Ed., p. 4914 note.

In the body of the text we find this statement:

"It is a principle frequently asserted that if a servant is killed and there are no eye witnesses of the accident, the presumption will be indulged that he was in the exercise of due care; *especially if, when last seen, he was acting with due care and within the scope of his duties.* This principle enures to the benefit of the servant even in those jurisdictions in which the burden of proof is upon the plaintiff, the presumption arising from the instinct of self-preservation being sufficient to sustain the *burden;* in fact, it is *in such jurisdictions only that this principle finds its effective application.*" (Italics ours.)

Thus, in New York, where the burden is upon the *plaintiff* to *disprove* contributory negligence, we find:

"Where an employe is killed and is thus unable to explain his action just prior to the happening of the accident, which no one witnessed, the rule requiring evidence to show affirmatively that there was no contributory negligence is much relaxed; and if, from all the evidence, the jury are justified in finding that the deceased did proceed with the care required of him by law, the lack of direct testimony as to his conduct is not a bar to his recovery. Glennon vs. Star Co., 114 N. Y. Supp. 1044, 91 N. E. 1113." (Italics ours.)

If such a presumption is to be permitted in jurisdictions where the burden of proving deceased's freedom from contributory negligence is upon plaintiff, under what rule of common sense or law can it be said that the same presumption should not be permitted in this State, where the burden of proof is upon defendant to show contributory negligence?

Under our law, the burden of proving contributory negligence is upon defendant. That means that defendant must establish by direct proof, that deceased was guilty of contributory negligence. This, it has failed to do.

[fol. 286] It is true that the Court has found as a matter of fact that deceased was "sitting or squatting" near enough to the track to be struck by the locomotive; but where is the evidence to sustain that finding? The only people (the engineer and the fireman) who could have seen him in such a position have sworn, positively and unequivocally, that he was not there; if he was there, the engineer and fireman were not keeping the keen lookout which they say they were keeping, and it should be presumed by this Court that the jury so found, since no instructions were asked by the defendant in the trial court and all assumptions and inferences on appeal should be in favor of the judgment of the trial court.

This Court has simply fallen into an error that is common when a court sitting in office tries to function as a jury. It may appear a bit easy for a court to sit in the office and figure out a theory of just how a thing happened miles away; but usually, such theory is just about as liable to be incorrect as to be correct, and it is really best for a court to not indulge in this pastime of getting in the jury box, for it is not always so easy to demonstrate as in this case that the court has come to the wrong conclusion; and in those cases where one cannot demonstrate that the court has come to the wrong conclusion, the judgment of the court setting aside the verdict of a jury is apt to be just as erroneous as in this case, and the error remain uncorrected by reason of the fact that it is not the subject of demonstration as in this case.

It is so well known among the people of our country that the trained mind of the educated man is not always so reliable as that of the common man in disposing of issues of facts and in reaching the truth as disclosed by testimony,

that it has usually been held that questions of negligence and contributory negligence are for the jury, except in cases [fol. 287] of violation of a statute or where it is impossible for reasonable minds to differ; and in some jurisdictions, it is so clearly appreciated, as in Oklahoma, that it is embodied in the constitution as a part of the organic law that the issue of contributory negligence shall always remain for the determination of the jury.

We point out that one of the appellant's witnesses testified that he saw the deceased at about six-forty o'clock p. m. engaged in his work.

L. E. Crawford testified:

"I saw Mr. Ferguson again that night after I saw him at the caboose. I seen him about six-forty, I imagine it was him, I seen a man working on the train, somebody with a lantern.

"Cross-examination:

"He was working on extra 496 north-bound train; that was a freight train, and he appeared to be inspecting the cars, from where I saw him he appeared to be, he was down at a cut of cars. I know how the inspector's work is done, and from where I saw him he appeared to be doing that; he was fifteen or twenty car lengths from me, I expect, something like that, and the crew was making up the train then, they were switching cars down to where they had put the caboose—they put the caboose on track No. One next to the main line and then they shoved the cars in on the north end of that caboose, and in that way built up the train on that track. If I remember right about twelve or fifteen cars had been thrown down to the caboose up to the time the passenger train came in, maybe not that many, or maybe more." (S. F. 116-117.)

We regret that this testimony and that of the engineer and fireman and that of Nick Franklin as to the manner of making up this freight train was not specifically referred to in appellee's brief; but we thought that the only contention made by appellant as to deceased's contributory negligence was that he was drunk some hours before his

death; and since this testimony was disputed, we had no idea that the Court would hold that deceased was guilty of contributory negligence as a matter of law, in regard to his position and conduct at the time of his injury. And we believe that, after considering this testimony, together with the authorities above quoted and the authorities quoted [fol. 288] in appellee's brief, that the Court will correct this error by granting this motion and affirming the judgment of the trial court.

We here pause to remark that if he met his death by reason of the glaring headlight — in other words, if it was a proximate contributing cause to his injury, then the defense of contributory negligence would not be available, as his death would have been caused in whole or in part by reason of a violation of the safety appliance regulations.

We respectfully urge the Court seriously to consider the consequences of the ruling announced in this case upon the presumptions which may be allowed as to contributory negligence. An examination of the testimony quoted under this motion for rehearing shows plainly that up to the moment of D. R. Ferguson's death, the train crew which was engaged in making up the freight train upon which he was working was continually shifting cars onto the track No. One, or the one upon which the freight train was being made up. This made it necessary for Ferguson to be continually on the lookout for cars which were shifted down by this freight train crew. It is, moreover, entirely probable that Ferguson had gone to one of the cars which had been shifted in by the freight train crew for the purpose of making "light repairs," and that he was coming out from this car or between two cars upon which he had been working at the time the passenger train came in. Appellee showed from the testimony of living witnesses that Ferguson was at the proper place for him to be working and that he was working shortly before his death (see testimony of Travis Barnhill and Reed Holton, S. F. 55, S. F. 60-61; Appellee's brief pp. 21-22. See also the testimony of L. E. Crawford and L. H. Thorla, above referred to).

[fol. 289] Now, if the burden of proving contributory negligence is, as we believe, upon the defendant in cases of this kind, wherein can appellee be called upon to do more than

to prove that the deceased was at his proper post and engaged in his proper work when last seen alive? For the Court to require him to prove deceased's conduct up to the moment of his death would be to place the burden upon plaintiff, not only to prove that he was not guilty of contributory negligence in cases of injury, but would force him to prove his freedom from contributory negligence when the injured party was dead. Thus, if one were killed because of the negligence of another, and there were no eye witnesses to the death, no recovery could be had for such death, under the reasoning of the Court in this case.

We cannot believe that this Court intends to promulgate any such rule. The Court may say that deceased "failed to use any diligence to get away from the approaching train, having time to do so," but there is no evidence that deceased knew of the approaching train until it was so close upon him that he had no time to escape it. It may have been that the evidence introduced by appellant was strong enough to have justified the jury in saying that deceased was guilty of contributory negligence, but if the evidence introduced by appellant in this case is sufficient to force the Court to say that deceased was guilty of contributory negligence as a matter of law, then plaintiffs in this State will be in a worse situation than they are in Louisiana and similar corporation-ruled principalities, for even in New York, as shown by the case quoted from above, where every burden is placed upon the plaintiffs, in the death of one injured by the negligence of another, in the absence of eye witnesses to that death, the dead man is presumed to have used ordinary care for his own safety.

[fol. 290] However, we find that any argument which we seek to offer upon this phase of the case forces us to reason in a circle. We cannot understand how the Court arrives at its conclusion as to deceased's having been guilty of contributory negligence as a matter of law, and we cannot offer any more authority—or rather, we will not offer any more authority—than that already presented to the Court in appellee's brief, and the reference to LaBatt's Master & Servant above, under which the authorities are collated at some length.

IV

The Court erred in finding, as a matter of fact, that the evidence was not sufficient to sustain the finding of the jury that the failure to blow the whistle was an efficient cause of D. R. Ferguson's death.

In answer to special issue No. 9 of the Court's charge, the jury found that the employes of the appellant railway company failed to sound the whistle of the said engine as said train approached the yard wherein the said D. R. Ferguson was working. In answer to special issue No. 10, the jury found that this failure to sound the whistle of said engine was negligence. In answer to special issue No. 11, the jury found that "the failure to sound the whistle of said engine (was) a proximate cause of the death of the said D. R. Ferguson, as that term—proximate cause—has been defined. Transcript pp. 19, 62. The engineer testified that it was a part of his duty to blow the whistle as he went into the yards at Leesville, and it would have been a violation of the rules not to do it; that it would attract the attention of anybody within half a mile of it that the train was there. (S. F. 89.)

Without the testimony of the engineer as to his duty to blow the whistles, ordinary common sense would teach us [fol. 291] that the one purpose, and the only purpose, for having whistles on locomotives is in order that persons who may be in the way or near the path of such locomotive may be warned of the approach of the train. It may be argued in some places, and held in some courts, that the railway company owes no duty to warn its employes of the approach of a train. Certainly, however, where the testimony is as it is in this case, that the duty is owed to warn workmen in the yard of the approach of a train, and the only warning signals with which a locomotive is equipped are the bell and the whistle, it seems clear that a violation of one of these duties to warn is negligence.

For a statement as to the testimony regarding the failure of the employes of appellant to sound the warning of the whistle, we respectfully refer the Court to our brief filed in this case, pp. 18-24. It is quite true that several witnesses—among them, the engineer, whose duty it was to blow the whistle—testified that the whistle was blown. It is said that it is the jury's privilege to pass upon con-

troverted issues of fact. If that saying is true, certainly, it seems to us that the jury was authorized in saying that the employes of appellant failed to blow the whistle; that the failure to blow the whistle was negligence; and that such negligence was a proximate cause of the death of D. R. Ferguson. It may be quite true that the failure to blow the whistle was not the sole proximate cause of Ferguson's death; nor is it necessary for one single, solitary, isolated act of negligence to be the sole cause of the death or injury of a person, to hold the wrongdoer liable. The person in charge of a locomotive may be guilty of several acts of negligence at the same time, and we think that the testimony in this case shows that the operator of this passenger locomotive was guilty of several acts of negligence, and [fol. 292] that these separate acts of negligence operated as proximate causes of the death of D. R. Ferguson. It might be possible that the failure to blow the whistle "of itself and by itself" was not the sole proximate cause of D. R. Ferguson's death, if the train had been coming in slowly with the bell ringing loud and vigorously; but, with evidence in the case that the bell was not rung, that the train was run at an unusually high rate of speed (when it should have been "under control"), we think that the Court is overstepping its limits and unduly extending its powers in holding that the evidence does not warrant the finding of the jury that the failure to blow the whistle was a proximate cause of the death of D. R. Ferguson; and we earnestly and insistently request the Court to reconsider the evidence and the authorities upon this phase of the case.

V

The Court erred in concluding that the evidence does not warrant the finding made by the jury that the speed of the train at the time and under the circumstances was a proximate cause of D. R. Ferguson's death.

For a statement of the evidence as to the speed of the train, we respectfully refer the Court to appellee's brief on file in this case, pp. 18-23 and pp. 58, 59. We also call the Court's attention to appellee's first five counter propositions under appellant's twenty-ninth, fortieth and forty-first assignments of error, appellee's brief, pp. 9, 10, together with the statement and argument thereunder.

The engineer of the passenger train testified that he was required to keep his train under control in going through the yard at Leesville (S. F. 89). When a person speaks of keeping a moving vehicle, such as a train, an automobile or any other wheeled vehicle, under control, it means that [fol. 293] it can be stopped practically at once. If it was the engineer's duty to keep this passenger train under control when going through the yards at Leesville, as he testified it was his duty to do, and there is testimony which would justify the jury in saying that the train was not kept under control as it came through the yards at Leesville because it was running at a higher rate of speed than usual and customary, it seems to us that the jury was justified in finding that the train was run into and through the yards at Leesville at an unusually high rate of speed; that running it through the yards at such speed was negligence; and that such negligence was a proximate cause of the death of D. R. Ferguson. We are pointed to no authority, nor are we given the benefit of any reasoning of the Court as to why the jury was not justified in so finding, and we earnestly request the Court that if they continue to hold, as the opinion stands now, that there was not sufficient evidence upon the issue of the speed of the train and the failure to blow the whistle, to warrant the jury in finding that one or both of them were efficient causes of Ferguson's death, that they explain to us why the jury is not justified in finding that such failure to blow the whistle and the operation of the train at such speed were not efficient causes of D. R. Ferguson's death.

We shall not further extend this motion by quoting additional authorities upon the undoubted power of the jury to pass upon the issues of fact; but we cannot refrain from saying that if the Court intends to say that the jury no longer has that power, that it should say so in plain words. It is true that the Court says that "each issue of negligence was separately submitted and found by the jury to be a distinctive act of negligence," but each issue was submitted to the jury for their determination as to whether or not it was a proximate cause of the death of D. R. Fergu- [fol. 294] son. It could not possibly be true that the jury found that each act of negligence separately and distinctly was the proximate cause of D. R. Ferguson's death. The

ordinary usage of the words "a" and "the" does not permit such construction of the jury's answers to the special issues.

It is the writer's understanding of the law that where there are various issues of fact to be determined in a case, that the issues are submitted to the jury for their determination, but that the jury is supposed to have some few grains of intelligence, and to answer the questions submitted to them as they relate to the case—not as abstract propositions unrelated to each other.

We shall not further extend this motion by quoting additional authorities upon the power of the jury to pass upon disputed issues of fact, as it is believed that the Court has not intended to deprive the jury of this power:

VI

If the Court shall still insist that the verdict of the jury is excessive, the Court has erred in failing to find the amount by which it is excessive, and should so find and give the appellee permission to pass upon the question of whether he will remit the excessive portion of the verdict or permit the case to be reversed.

We make no further comment on this proposition than to call the Court's attention to the case of Wilson vs. Freeman, 185 S. W. 993, in which the Supreme Court of Texas lays down the rule that the statute with reference to excessive verdicts is mandatory, and while we appreciate the suggestion contained in the opinion in the case at bar, that the jury having found there was no contributory negligence, the Court hesitates to say by what amount the verdict is excessive on account of the contributory negligence [fol. 295] that the Court has found to exist as a matter of law. Nevertheless, while we are absolutely certain that this Court has grievously erred in holding that the evidence was sufficient to show that Ferguson was guilty of contributory negligence as a matter of law and feel that we have demonstrated such error, if this Court is still of the opinion that he was guilty of contributory negligence as a matter of law, we believe that it is within the province of the Court, and that it is its duty to do so to state the extent to which such contributory negligence has tainted the verdict.

In the event the Court continues to persist that Ferguson was guilty of contributory negligence as a matter of law, we ask that the Court find the amount to which his contributory negligence should diminish the verdict, and permit the appellee to then pass upon whether the verdict will be so reduced and affirmed or the cause reversed and remanded. We, of course, persistently insist that the Court has erred in finding that Ferguson was guilty of contributory negligence, and that the verdict as rendered by the jury ought to be affirmed.

We respectfully submit that for the errors herein pointed out, this motion should be granted, and the judgment of the Court of Civil Appeals reversing and remanding this cause to the trial court be set aside and the judgment in the trial court be in all things affirmed.

Respectfully submitted.

Jones, Jones & Buck, Marshall, Texas, and Keeney & Dalby, Texarkana, Texas, Attorneys for Appellee.

[fol. 296] [File endorsement omitted.]

IN THE COURT OF CIVIL APPEALS

[Title omitted]

MOTION FOR REHEARING OF K. C. S. RY. CO.—Filed February 26, 1926; in Supreme Court December 8, 1926

Comes now the Kansas City Southern Railway Company, appellant in the above styled and numbered cause, and prays that the court grant a re-hearing of this cause, and on such re-hearing, not only reverse the judgment of the District Court of Bowie County, Texas, but here render judgment in favor of the appellant, and against the appellee. [fol. 297] The action on the part of the court is prayed for the following reasons, to-wit:

1

Because the court erred in finding and deciding that there was causal relation between the alleged failure of

the servants of the appellant to ring the bell of the locomotive while it was passing through the yard, and the death of the deceased. It was error for the court so to find and decide, because there was no evidence introduced at the trial from which it could reasonably be found that the failure to ring the bell on the locomotive, if indeed there was such failure, was a proximate or contributing cause of the death of deceased, in this:

The evidence without dispute showed (1) that the deceased was familiar with the appellant's yard, and the location of its tracks in the yard where he was killed, and knew the track upon which the train alleged to have struck and killed him came into Leesville. (2) He knew the time for the arrival of such train. (3) He had no duties to perform which rendered it necessary for him to be upon, or even dangerously near the track upon which the train came into Leesville. (4) The train in question passed through the yards, and arrived at Leesville exactly on schedule time. (5) There was no evidence that deceased did not see or hear the approach of the train in time to prevent being struck thereby. (6) Even if it be granted that the bell of the train was not rung, the light shed by the headlight, far in advance of the locomotive, upon and along the track, and the noise of the approaching train, were sufficient fully to apprise the deceased, or any reasonable man, of the approach of the train, and of the danger to be anticipated by getting upon the track upon which it was approaching, or going near thereto. (7) Because the court finds as a fact, [fol. 298] which finding is based on the undisputed evidence, that "in approaching the yards, the passenger train made a great deal of noise; the roar of the train was heard by many of the witnesses long before it reached the point where the body of the deceased lay. The deceased's own children heard the train approaching for over a mile. It was a quiet Sunday evening, and there was no noise in the yard to distract attention."

In view of the foregoing, it is insisted that the finding or conclusion of the court, to the effect that the alleged failure to ring the bell of the locomotive was a proximate cause of the death of the deceased, is unwarranted by the evidence.

2

Because the court erred in failing to find and decide that the death of the deceased was solely caused by his own negligence and carelessness.

It was the duty of the deceased, according to the undisputed evidence—that is to say, by evidence introduced by the appellee, to look out for and avoid being struck by locomotives passing through the yard. When the passenger train passed by the point where the deceased was struck and killed, he was not engaged in any service; that is, was not so engrossed in the performance of any work as that it can be said he was oblivious to the approach of the train. On the other hand, the testimony without dispute circumstantially shows, and the court so finds, as we understand the opinion, that he had finished the immediate work at hand and was standing at the end of the string of box cars, waiting for other cars to be brought down before inspecting them. No other trains or cars were moving about in the yard, so as to divert his attention from the approaching train. The approaching train cast, for several hundred [fol. 299] feet ahead of it, a brilliant light from its headlight. The roar of the train was so great as to attract the attention of his own children, who were a considerable distance away from the track. In fact, they could hear the approach of the train long before it reached the point where deceased was killed. The engineer and fireman were keeping a look-out, and so long as they could see about the place where the deceased was struck, he was neither upon the track, nor so close thereto as to be in danger of being struck by the locomotive. There was no evidence introduced at the trial from which the jury, or the court, could reasonably find that deceased was sitting or squatting dangerously near the track at any time when the engineer and fireman, by keeping a diligent look-out, as they did, could have seen him. The circumstantial evidence in this case points, in our opinion, to the fact that the deceased, while under the influence of liquor, and being grossly careless and negligent, and having no regard for his own safety, and while the locomotive was passing over that part of the track near which he was, either walked or stumbled so close to the track as to be struck by the pilot beam of the

locomotive. It is, therefore, insisted that the undisputed facts in this case show that the death of the deceased was solely caused by his own negligence, and that to his death, no negligence on the part of the appellant, its servants or employees, could have, in fact, contributed.

3

Because the court erred in finding and deciding that the jury, in view of the evidence, was authorized to find that deceased did not assume the risk of being struck by the locomotive, at the time and place he is alleged to have been struck and killed. This was error, because (1) The deceased had long been employed in the yard, and was familiar with the location of the tracks, and knew that the [fol. 300] train, which is alleged to have struck and killed him, would come in to the depot at Leesville on the identical track on which it ran when coming into the station at the time deceased was killed. (2) The undisputed evidence showed that deceased knew the time for the arrival of the train. (3) It was his duty to look out for and avoid injury from trains passing over that track. (4) In the performance of his duties, it was not necessary for the deceased to be upon, nor dangerously near the track upon which the train came into Leesville. (5) Independent of any blowing of the whistle or ringing of the bell, the light cast from the headlight, and the roar of the train, was amply sufficient to apprise the deceased, or any rational person, of the approach of the train. The deceased did not need the blowing of a whistle, or the ringing of a bell, to apprise him of what every one else who testified in the case, including his own children, saw and heard. (6) The evidence circumstantially, and without dispute, shows that the deceased suddenly, and at a time when he could not — been seen by the engineer or fireman, brought himself in such proximity to the track upon which the train was being operated, as to cause him to be struck and killed by the same.

5

Because the court erred in failing to set aside each and all of the findings of the jury affirming the proximate cause of the deceased's death, because each and all of such

findings are unsupported by any evidence, and are contrary to reason, and every circumstance attending the death of the deceased.

Wherefore, and for the foregoing reasons, the appellant prays that the court re-hear this cause, and upon such rehearing, not only reverse the judgment of the District Court of Bowie County, but instead of remanding the cause, here render judgment in favor of appellant.

[fol. 301] In this connection, it might be said that this cause has been twice tried in the court below. The facts have been fully developed, and we earnestly contend that the court below should peremptorily have charged the jury, in view of the undisputed evidence, to return a verdict for the appellant.

Messrs. S. P. Jones and Kenney & Dalby, are attorneys of record for the appellee. Mr. Jones' Postoffice address is Marshall, Texas, and that of Kenney & Dalby is Texarkana, Texas.

Respectfully submitted.

King, Mahaffey & Wheeler, Attorneys for Appellants.

[fol. 302] IN COURT OF CIVIL APPEALS

[Title omitted]

REPLY TO APPELLANTS' MOTION FOR REHEARING—Filed April 7, 1926; in Supreme Court December 8, 1926

The writer believes that the brief, supplemental brief, motion for rehearing and supplemental argument thereon prepared by our former Mr. Leonard Jones, fully covers this case, and conclusively shows that the question of Ferguson's contributory negligence was an issue of fact to be determined by the jury. Therefore, this answer will be confined largely to a discussion and explanation of the cases relied upon by appellant in its argument on motion for rehearing. But at the outset, we call the attention of this court to the following pertinent facts either conclusively shown by the evidence or properly found by the jury on sufficient evidence to support the finding, viz:

That the deceased was actively engaged in the discharge of his duties up to the moment of his death, and his injury was caused by the failure of the defendant to follow its previous custom of ringing the bell, which would have warned one in his position of the immediate approach of the train.

That the work of the deceased made it customary if not necessary for him to step back from the opening between the cars he was inspecting in the discharge of his duty, and the narrow zone that was absolutely safe was so small that [fol. 303] it is a matter of the commonest knowledge that unless he was warned by the sharp ringing of the bell, of the sudden approach of the train, and its nearness to him, he would probably step far enough away from the standing cars to come in the danger zone; whereas, if the bell had been ringing, he probably would not have done so.

The deceased must have stepped from between the cars in this way, as his presence would have been discovered if he had been loitering or standing in the path of danger as the train approached.

Again, it is a matter of the commonest knowledge that railroad employes may not notice the rumbling noise of an approaching train, especially where it has been the custom to ring the bell before it reaches a place where it endangers their safety, and if they do notice the general noise of the train, that they may not notice the nearness thereof, or that it is certainly approaching on the track that will endanger them, where the usual or customary warning is not given. In other words, they become accustomed to listening for the bell and subconsciously heeling its warning, and likewise, to pay little or no attention to the location of engines that are not given the usual warning.

It is likewise a matter of very common knowledge that a general noise made by a rapidly approaching train does not travel fast enough in front of the train to convey to a person in front information as to the dangerous nearness thereof.

We call attention of this court to the fact that if the court should try to work out the plan of reasoning adopted by the United States Supreme Court in disposing of its cases, and follow same literally, that the verdict must inevitably stand because there is certainly no such conclu-

sive proof of contributory negligence on the part of the de- [fol. 304] ceased, as would permit the court to direct a verdict for the appellant.

The courts of our country must not ignore the fact that the tendency of our civilization is to place upon industries, and especially railroad companies, the burden of compensating for death and injury occasioned by the negligence of employes, as is so forcefully illustrated in the Safety Appliance and Federal Employer's Liability legislation enacted by our Congress.

The duty of refraining from negligently injuring an employe is imposed by this legislation; nor does the conduct of the injured or killed employe diminish the damages where he fails to anticipate and provide against negligence on the part of the master, especially where his own duties are such as to tend to make him oblivious to the danger that is brought upon him by the master's negligence. Any other interpretation or construction would be inconsistent with the beneficient purposes of that legislation.

Taking up the case relied upon by the appellant in support of its application for rehearing:

We find nothing in the case of Railway Comapny vs. Houston, 95 U. S. 697, which remotely sustains the contention of the appellant. In the Houston case, the injured person was not doing any work connected with the Railway Company, nor was she on the premises on business with the Railway Company, nor was there any proof—direct, circumstantial or otherwise—that raised the issue of her attention being distracted from her plain duty to look out for the approach of the plainly visible train before walking onto the track immediately in front of it. Her main work or the thing upon which her mind was mainly intent was "crossing the railroad track." It was held, under such circumstances, that it was her duty to have discovered the approach of the engine that was plainly visible for three- [fol. 305] quarters of a mile and to have avoided it, inasmuch as there was nothing to indicate that her attention was directed away from that duty of looking and listening. In our case, Ferguson's main duty was to properly perform his work, and not to look out for danger from a train that was approaching without discharging the duty that its own custom had imposed upon those operating the train, to-wit,

the ringing of the bell. It was Ferguson's duty to listen for the ringing of the bell because that was the customary way the train approached. He did not violate his duty to the company by failing to discover a train was violating a custom the appellant had established.

The case of Elliott vs. C. M. & S. P. Railway Company, 150 U. S. 245, appellant's printed argument, p. 18, contains nothing that strengthens the appellant's contention or tends to show that the court has erred in holding that the question of Ferguson's contributory negligence was one of fact for the jury. In that case, Elliott was crossing a railroad track in broad daylight and was familiar with the methods of switching in that place, and there was no proof that cars approaching under such circumstances should have given him warning of their nearness. A very different situation to the one here where Ferguson's work brought him back and forth to the main line track and the duty of ringing the bell and his right to rely upon it existed by virtue of a custom that the appellant itself had established.

We also pause to remark that the Elliott case, decided in 1893, is not in keeping with the more recent decisions of the United States Supreme Court.

The next case relied upon by the appellant is Northern Pacific Railway Company vs. Freeman, 174 U. S. 379. This [fol. 306] case has no application to the facts in the Ferguson case. Freeman was killed in the daytime, at a railroad crossing which he approached at right angles. He was driving a slow team, and the uncontroverted proof showed that he did not look to right or left and did not check the speed of his horses until the train struck him. The court did say, in effect, that if he looked and listened, he necessarily saw the train and drove directly into the path of danger. That there was no testimony tending to show that his attention was attracted to other matters which would excuse him from looking and listening, the court saying:

"When it appears that if proper precautions were taken, they could not have failed to prove effectual, the court has no right to assume, especially in face of all the oral testimony, that such precautions were taken."

The court also recognized, in that case, the general doctrine that where there are "obstructions interfering with

the view of approaching trains, confusion caused by trains approaching from opposite directions or other peculiar circumstances tending to mislead the injured party," that contributory negligence is not established as a matter of law. It is significant to note that Chief Justice Fuller and Mr. Justice Harlan dissented from the majority opinion in the Freeman case. Thus begins the trend to a more liberal doctrine in the consideration of the rights of persons who are injured by the negligence of others.

Appellant cannot lead us (or this court) away from the fact that the deceased would not be guilty of contributory negligence by failing to keep such a lookout as would have discovered danger from a source where he had no reason to [fol. 307] expect it, or from a train which, by the established custom of the appellant, had been theretofore operated in a way that would have apprised him of his danger on the occasion, and saved his life, but for the fact that it was being negligently operated in violation of the usages of that custom.

If there was no testimony on the point—yea, if all the testimony was to the effect that Ferguson should not have at any time been on the west side of the cars being made into a train, we would know that in discharging his duty of inspecting the safety devices on those cars—such as handholds, ladders and levers—he must have been on the west as well as the east side of the cars.

The appellant says that there was no necessity for Ferguson to be on the west side of the cars he was inspecting, and cites the testimony of one witness to that effect; while the testimony of other witnesses (Morgan, S. F. p. 138 and Nick Franklin, S. F. 34-35) shows that there was nothing improper in the inspector working on either side of the cars and that it was in fact customary for him to do so. Of course, we can construct theories now as to how Ferguson could have anticipated the negligence of those on the engine in failing to ring the bell, and have avoided it, but he was no more required to anticipate such negligence and avoid it, than he was to give up his job and engage in farming to avoid the consequences of the appellant's negligence—a suggestion unnecessary to be entertained in view of the fact that the appellant had adopted a custom of ringing the bell, which, when followed, had protected Fergu-

son's life; and if that custom had been complied with in this instance, he doubtless would not have been injured. We repeat that there would be just as much sense in say-[fol. 308] ing, if Ferguson had quit his job and gone to farming, he would not have been injured, as to say, if he had remained on the east side of the cars, he would not have been hurt.

It is also true that Ferguson could have anticipated the appellant's negligence and as he came from between the cars, been very careful to get his body not more than a foot away from the car, and thus have avoided the effect of the negligence, but it is impractical for work to be done in that way, and before courts encourage railroads into thinking that they will ever establish any such theory or doctrine as that the injured employe will be held guilty of contributory negligence by failing to complicate his own duty, (and probably to some extent, neglect it), with the burden of anticipating negligence on the part of the railway company and taking means to avoid it, it will be well to carefully consider the opinion in Johnson vs. Railway, 196 U. S. 1, where the Chief Justice of the United States Supreme Court calls attention to the statistics of this country under a condition that was less harmful than would be the requirement of the employe to anticipate and avoid negligence of the master—the following language being used:

"It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war."

We now come to a discussion of the last subdivision of the appellant's argument, to-wit, its contention that the evidence was not sufficient to show that its negligent failure to ring the bell was a proximate cause of Ferguson's death (Appellant's printed argument, p. 33, et seq.). The appellant indulges in the pastime of "re-threshing old straw"—combating principles of law long and well established, by [fol. 309] a misunderstanding and mis-application of the testimony to the law, and a differentiation by citing cases believed to be wholly inapplicable. It would seem that this

entire argument of the appellant could be dismissed by a mere reference to the case of Myers vs. Pittsburgh Coal Company, 233 U. S. 184, cited and discussed in our original printed brief in this case, pp. 36, 38. The case with which the appellant misunderstands and endeavors to mis-apply the law applicable to this case is illustrated by the following erroneous statement, emphasized in italics in its printed argument, p. 37, where it says:

"Primarily, it was necessary for the appellee to prove that the deceased did not and could not, by the exercise of ordinary care for his own safety, either see or hear the approaching train that struck and killed him, in time to avoid injury therefrom, and that had the bell been rung, he would have known of the approach of the train in time, by the exercise of such care, to avoid injury therefrom."

When did it become a part of the law of the land that the burden of proving the absence of contributory negligence on the part of an injured person rests upon such injured person? That would be the assertion of a doctrine that is not supported by the authorities—in fact, is contrary to the decisions, except in the State of Massachusetts and probably a few others. But, even in the State of Massachusetts, and as we understand it, in the jurisprudence of the civilized world, it is universal that in death cases, the burden is upon the person inflicting the injury to prove such affirmative defenses as contributory negligence of the deceased. The appellant clearly has not met this burden, cannot meet it, for, as has been pointed out in our original printed brief, our supplemental brief, our motion for rehearing and additional argument thereon, the evidence abundantly sustains the finding of the jury that the deceased was free of contributory negligence. The proof showing that the appellant had established the custom of [fol. 310] its engines ringing the bell as a warning to employes situated as was Ferguson, and that it failed to observe the custom in this case and the evidence being sufficient to show that as a result thereof, Ferguson was struck, the burden then passed to the appellant to show that Ferguson failed to do those things which duty required of him, and that such failure proximately contributed to

the injury that caused his death; and the fact that the law presumes that he did everything that a person of ordinary prudence would have done, cannot be brushed aside or lightly treated by the appellant. In fact, they are not dependent upon judicial precedent—they are deeply rooted in the principles of our civilization. These things are based upon time-honored precedents, and are supported by that which springs from the application of the fund of common sense, honesty and justice that comes to us from a fair consideration of the rights of human beings, and their desire to protect their bodies from injury and preserve their lives, which is familiar to all intelligent persons.

The appellant persists in losing sight of or ignoring the fact that the deceased could have heard the train or known of its approach in a general way and yet be free of contributory negligence by being, to a certain extent, engrossed in his work and depending upon the ringing of the bell to apprise him of the fact when the train reached a point of nearness that would call upon him to keep out of its path.

Appellant also refuses to recognize the doctrine and the presumption that the deceased was so engrossed in his work that he paid no attention to the ordinary noise made by that train and depended upon the sharp noise of the [fol. 311] customary alarm—the ringing of the bell—to advise him of its approach.

The deceased had to watch out for the engine and the cars of the train that he was inspecting, as these were handled without signals. This made it absolutely necessary for the appellant to give him the customary warning. All these matters were to be, and doubtless were, properly considered by the jury in passing upon the appellant's negligence, and the deceased being free of contributory negligence.

The appellant also argues on p. 47 of its printed brief, that if it be conceded that the bell was not rung, there was no evidence that the deceased would have been apprised of the approach of the train and have avoided injury therefrom. That is exactly why the appellant was required to ring the bell, to give him the notice and to enable him to avoid injury—to give him a chance for his life; and if it was not a fact known to all that such warning is usually

heeded, we have the proof in this case that it had been heeded by the deceased in the past, in that he was never injured or brought in a situation of danger during the long time the appellant's train had been operated in the exercise of care, by carrying out the custom it had established of ringing the bell as a warning to persons situated as was the deceased at the time. This is not building presumptions upon presumptions, but the application of well-established principles to the facts as found by the jury.

The appellant cites the case of United States vs. Ross (its printed argument p. 48), but an examination of the facts that form the basis of the remarks quoted in the said argument from that case shows a very different statement of facts to what we have here. In that case, Ross' cotton [fol. 312] was seized in May, 1864, and the thirty-one bales, shortly thereafter, were removed on Government wagons to warehouse connecting with a road from Rome to Kingston. It was shown that some cotton arrived in Kingston from Rome before August 19, 1864, and was forwarded to Chattanooga; that on the 19th day of August, forty-two bales were received at Chattanooga from the quartermaster at Kingston; that later, they were shipped to Nashville, where they were received as coming from Kingston, turned over to the treasurer agent and sold, it was not shown whether the cotton seized at Rome in May, 1864 was sent to Kingston before August 19, 1864. Therefore, there was nothing to show or indicate that the plaintiff's cotton reached Kingston in time to be a part of the shipment that went to Chattanooga on the 19th day of August. It was merely held that there were not sufficient facts to justify a finding that the plaintiff's cotton reached Kingston in time to have been shipped to Chattanooga or was in fact included in the shipment that went to Chattanooga; and that, therefore, there was nothing upon which to base the conclusion that the cotton was a part of this shipment.

The case of Manning vs. Insurance Company, 100 U. S. 693, (quoted from by appellant in its printed argument p. 49), goes no further than to decide that an agent seeking to recover commission on premiums paid to the insurance company where he relies upon the premiums having been paid on policies renewed in subsequent years, cannot recover by merely showing that the policies were written with-

out going further and showing that they had been renewed. In other words, that there was no presumption that the policies had been renewed from year to year and kept alive by payment of premiums.

The case of Xenia Bank vs. Steward, 114 U. S. 224 (ap-[fol. 313] pellant's printed argument p. 49), is not in point and sheds no light whatever upon the question under investigation.

The case of M. K. & T. Railway Company vs. Thompson, 33 S. W., 718 (quoted in appellant's printed argument p. 50), throws no light upon the subject, and is not in point; but attention is called to the fact that the case referred to has long served its purpose and passed on to the trash-pile of judicial declarations so far as usefulness is concerned, as evidenced by the more rational and sane doctrine announced in the case of S. A. & A. P. Railway vs. Wagner, 166 S. W. 24 (writ of error denied and the case finally affirmed by the United States Supreme Court in the case of S. A. & A. P. Railway vs. Wagner, 241 U. S. 476), which holds that the failure of the coupler or a pin or a device of that character to function is sufficient to establish its defective condition.

Whatever may have been the rule at one time of presumptions and inferences, or the views of the Judges of the United States Supreme Court, it is clear that the case of Myers vs. Pittsburgh Coal Company, 233 U. S. 184 (quoted from in our printed brief p. 36), establishes a rule that clearly sustains our contention in this case. It seems that one should not be required to argue the soundness of the doctrine that where proof clearly shows that if the bell had been rung as was the custom, that Ferguson would have been apprised of the danger and avoided it when we realize that the very purpose of the establishment of that custom of ringing the bell was to enable persons situated as was Ferguson to avoid injury; and when we further realize that on all those occasions when the custom had been observed, he in fact had avoided injury.

[fol. 314] We respectfully submit that the appellant's motion for rehearing should be in all things denied.

Jones, Jones & Buck, Keeney & Dalby, Attorneys for Appellee.

[File endorsement omitted.]

In Court of Civil Appeals

[Title omitted]

Supplemental Reply to Appellant's Motion for Rehearing—Filed March 1, 1926; in Supreme Court December 8, 1926

Since appellee filed his motion for rehearing, the appellant has filed a motion for rehearing, in which it practically joins the appellee in the contention that this Court erred in [fol. 315] finding that there was any evidence to support its theory that Ferguson was sitting, stooping or squatting at or about the ends of the ties or was hit by the pilot step, and admits, as fully and sacredly as it can, that the deceased was struck by the pilot beam while standing. This admission—this emphatic assertion—of the appellant, which is believed to be and certainly should be binding upon it, should not be lightly brushed aside by the Court, even though it obviates much of our argument in support of appellee's motion for rehearing.

Appellant argues with vehemence that there was no evidence introduced at the trial from which *the jury*, or the court, could reasonably find that deceased was sitting or squatting dangerously near the track," and that the circumstances point to the fact that deceased was struck by the pilot beam of the locomotive. (Italics ours.)

This is shown by the following quotation:

"*There was no evidence introduced at the trial from which the jury, or the court, could reasonably find that deceased was sitting or squatting dangerously near the track at any time when the engineer and fireman, by keeping a diligent lookout, as they did, could have seen him.* The circumstantial evidence in this case points, in our opinion, to the fact that the deceased, while under the influence of liquor, and being grossly careless and negligent, and having no regard for his own safety, and while the locomotive was passing over that part of the track near which he was, either walked or stumbled so close to the track as *to be struck by the pilot beam of the locomotive.*" (Italics ours.)

We thus find the appellant and appellee agreeing as to the manner in which deceased met his death, in that both

agree that there can be no doubt that deceased was stand-
[fol. 316] ing erect at the proper place for him to be if working, and that in some manner he failed to apprehend the close proximity of the train until too late for him to avoid it.

We contend that his failure to know or realize the close proximity of the train was due to the negligence of the operatives in (1) failing to blow the whistle; (2) failing to ring the bell; (3) failing to dim the headlight; (4) failing to keep the train under control—all of which were supported by the evidence and found by the jury in appellee's favor.

Appellant contends that deceased's failure to realize his danger was caused by his being drunk—which was disputed in the evidence and found against appellant by the jury.

Thus, the issue is sharply and distinctly drawn: Was deceased killed because he was drunk and staggered in front of the train?

Or, was deceased killed because of the negligence of the servants of appellant, in failing to ring the bell and thus warn him of the train's approach (as found by the Court to be a proximate cause of his death)?

In view of the admission and argument of appellant to the effect that the Court erred upon so vital an issue, we take it that the Court will retract that part of its opinion.

As to the contention made by appellant that the evidence conclusively shows that deceased, D. R. Ferguson, was drunk, and therefore guilty of contributory negligence as a matter of law, we point to the fact that it was not testified to by anyone that Ferguson was drinking after six o'clock p. m. No one testified that he was not acting as a rational, industrious workman would for over an hour before his
[fol. 317] death; the testimony that he had been drinking on the afternoon of his death was disputed by many witnesses (See appellee's brief on file, pp. 6-68, 23-24).

This, it seems to us, disposes of the contention that Ferguson was guilty of contributory negligence as a matter of law, for the jury found that D. R. Ferguson was not intoxicated at the time he was struck and killed (Answer to Special Issue No. 4, Transcript —, appellee's brief, p. 6).

Now, as the evidence is sharply conflicting upon the issue as to deceased's having been drinking upon the afternoon

of his death, and as the jury has found that he was not intoxicated and that he was not guilty of contributory negligence, and as appellant admits and argues (p. 3, appellant's motion for rehearing) that the Court has erred in so holding, we respectfully submit that the Court should grant appellee's motion for rehearing, and affirm the judgment of the trial court in this case.

We again call the Court's attention to the fact that the verdict of the jury as to deceased's being blinded by the headlight and as to appellant's negligence in failing to blow the whistle or to keep the train under control was amply supported by the evidence (see appellee's motion for rehearing, pp. 15-16; 32-36).

Respectfully submitted.

Jones, Jones & Buck, Marshall, Texas, and Keeney & Dalby, Texarkana, Texas, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 318] IN COURT OF CIVIL APPEALS

[Title omitted]

ORDER GRANTING APPELLEE'S MOTION FOR REHEARING—March 18, 1926

This cause came on to be heard on the transcript of the record and Appellee's motion for rehearing and the Court having inspected said record and duly considered said motion is of the opinion that the said motion should be and the same is hereby granted.

IN COURT OF CIVIL APPEALS

[Title omitted]

ORDER OVERRULING APPELLANT'S MOTION FOR REHEARING—March 18, 1926

This cause came on to be heard on the transcript of the record and appellant's motion for rehearing and the Court

having inspected said record and duly considered said motion is of the opinion that the said motion should be and the same is hereby overruled.

[fol. 319] IN COURT OF CIVIL APPEALS

[Title omitted]

OPINION ON MOTIONS FOR REHEARING—Filed March 18, 1926; in Supreme Court November 18, 1926

Both the appellant and the appellee have filed motions for rehearing, which are here considered and disposed of. The appeal was heretofore disposed of on two grounds: First, that there was evidence to support the jury finding of negligence in the particular instance in failing to ring the bell of the passenger-engine as customarily done in approaching the station of Leesville through the railway yards, and that such negligence could be regarded as a proximate cause of the injury and death, since the deceased had the right to rely upon the practice, he being rightfully at the place where he was working. If the witnesses so testifying are believed, there is proof rendering probable the existence of the fact, as found by the jury, that the bell of the engine was not kept ringing through the yards in the particular instance, as customarily done. It is not entirely improbable in the circumstances that such failure of warning was a cause of the deceased being struck by the engine. Therefore the question of actionable negligence vel non in that respect remains in the domain of [fol. 320] open fact and not of pure law, after all the evidence has been considered. We have further considered the other contentions of appellant's motion, and conclude that they should be overruled.

The second ground was that the evidence conclusively showed the injury was partly the result of the negligence of the deceased, and as a consequence the jury's finding to the contrary should be set aside because it was contrary to the legal effect of the evidence. This conclusion was based upon the determination made that all the circumstances unite in indicating the deceased, several minutes before the train arrived,

"moved back (from the end of the box car) nearer to the main line track and there sat down or squatted near the ends of the ties.—The deceased knew, as did the other yard men, that the passenger-train was likely to pass at 7:05 o'clock and that it was about that hour when he assumed that position near the track.—It was not a proper place to be—The deceased failed to use any diligence to get away from the approaching train, the glare of the headlight and the rattle of which he could have seen and heard when it was some distance away."

If that is not a correct determination of the facts, then the ruling made is erroneous; otherwise it is not wrong. Both the appellant and the appellee now challenge the conclusion of fact, and say "there is no evidence from which the jury or the court could reasonably find that deceased was sitting or squatting dangerously near the track."

Reference is made to the evidence of the engineer and fireman. The engineer testified:

"In going through that yard I was keeping a lookout. I did not see Mr. Ferguson or any other man on or near the tracks in going through the yards that night. I did see a lantern—a car-repairer's lantern—sitting on the ground beween the main line track and the passing track. I did not see Mr. Ferguson or any other man there about that lantern. I can see the ground within a few feet of the end of the pilot."

[fol. 321] The fireman testified:

"I was keeping a watch ahead in going through Leesville that night. I did not see any man on the tracks or near the tracks as we were passing through the yards. The headlight was giving a good light, so that I could see along the track through the yard there. I saw a lantern as I went through the yard, between the main line and passing track."

The failure to note the significance of this evidence of the operatives of the engine in the large record is inexcusable, at least on the part of the writer of the opinion. A change of the fact mentioned changes the legal conclusion reached, to the extent that contributory negligence ap-

peared as a matter of pure law. If the engineer and fireman are to be believed, and no reason appears why they should not be, then the deceased for an appreciable period of time prior to his injury was not knowingly standing and remaining in a position to be struck by the oncoming train, having time to avoid being struck by it. Hence it is thought, after all the substantive evidence has been considered, that the ultimate question of negligence vel non on the part of the deceased contributing to his injury remains in the domain of open fact for decision by the jury. There is proof rendering probable the existence of the fact, as was found by the jury, that the deceased did not "carelessly or while intoxicated place himself in such position upon or near the main line track that he was struck and killed by an incoming passenger-train." We have accepted the fact that the oncoming passenger-engine struck and killed the deceased. The deceased was rightfully between the two tracks, in the duties required of him at the time. He was between the two tracks, near the string of box cars he had inspected, immediately before the passenger-train [fol. 322] came along, in waiting for the switch-engine to come back with more cars to be inspected. And the evidence of the engineer and fireman can be accepted as meaning that the deceased was not, prior to the very moment of being struck, in a position of such nearness to the main line track as to be struck by the engine. It is not difficult to conceive that the deceased must have stepped in the path of the engine at some moment of its passing, with the result of being struck and killed by the pilot-beam or pilot of the engine, although he was not seen prior to that moment by the operatives of the engine. The inference is allowable that the deceased must necessarily have stepped quickly in the way of the engine for some cause, coming from somewhere very near the engine. The engine was running at the time "twenty or twenty-two miles an hour". Therefore, given the two premises, that the passenger-engine struck and killed the deceased, and that he was not in or near the path of the engine before the moment he was struck by it, it does not follow in a way too certain for doubting that the act and conduct of the deceased were lacking in due care to avert his injury. There is an absence of something else which would weigh mightily before negligence as a matter of pure law could be imputed to him,

which is the fact of whether or not deceased was aware of the approaching train, and in time to have avoided being struck by the engine. In view of the rattling noise of the train and the glare of the headlight on the engine, in connection with the fact that the deceased knew the train was about due, it is difficult to impute to him utter ignorance of the approaching train. Yet it is not wholly improbable that he was in reality unaware of the nearness of the engine [fol. 323] to him. The conduct and act of the deceased are not necessarily inconsistent with due care on his part to avert injury. It can be necessarily assumed from the instinct of self-preservation that he did not knowingly and deliberately place himself in the way of the engine to be struck. The jury expressly found that the deceased was not drunk. And the circumstances are not entirely unfavorable to the presumption that the deceased had mistakenly stepped in the path of the engine, due to deep confusion from some cause. As the evidence bearing upon the conduct of the deceased just prior to his being struck by the engine does not conclusively indicate that the deceased was unmindful of the danger of his surroundings, the entire matter was for the jury, as in their province to say, under our system of law.

We have considered appellant's other assignments of error, and think they should be overruled.

We grant the motion for rehearing, now set aside the former judgment of reversal, and here now enter a judgment of affirmance.

Levy, Associate Justice.

March 18, 1926.

[File endorsement omitted.]

[fol. 324] IN COURT OF CIVIL APPEALS

[Title omitted]

JUDGMENT—March 18, 1926

This cause coming on again to be heard on the transcript of the record and appellee's motion for rehearing and same being inspected, the Court is of the opinion that said mo-

tion should be granted and that the judgment heretofore rendered by this court on the 11th day of February A. D. 1926 reversing and remanding this cause to the court below for a new trial be set aside and that the judgment of the lower court be affirmed.

It is therefore ordered, adjudged and decreed by the court that the judgment of this court rendered on February 11, 1926, reversing and remanding this cause to the court below for a new trial be and same is set aside and judgment is here rendered affirming the judgment of the lower court, and that the appellee, Leonard Jones, Administrator of the estate of D. R. Ferguson, deceased, do have and recover of and from the appellant, the Kansas City Southern Railway Company and of the American Surety Company of New York, surety upon appellant's supersedeas bond, the full amount of the judgment recovered in the court below, together with all cost in this behalf expended, both in this court and the court below, for all of which execution may issue and this decision be certified below for observance.

[fol. 325] IN COURT OF CIVIL APPEALS

[Title omitted]

APPELLANT'S MOTION FOR REHEARING—Filed April 2, 1926; in Supreme Court December 8, 1926

Now comes the appellant in the above styled cause, and moves that the court set aside its judgment of affirmance rendered in such cause heretofore, on the 18th day of March, 1926, and that on such re-hearing, the court reverse the judgment of the trial court, and here render judgment in favor of the appellant. The granting of this motion is prayed, because:

1

This court erred in deciding that on the trial, there was sufficient evidence introduced to authorize the jury to find that the appellant was guilty of negligence which proximately caused or contributed to cause the death of the de-

ceased, D. R. Ferguson. In so holding, the court decided contrary to the provisions of the Federal Employers Liability Act, and the common law, as interpreted, declared and applied by the Supreme Court of the United States, and other federal courts.

2

This court erred in deciding that the evidence introduced on the trial of this cause was sufficient to authorize the jury to find, as it did, that the deceased, D. R. Ferguson, [fol. 326] was not himself guilty of negligence, either causing, or contributing to cause his death. This was error, because under the provisions of the Federal Employers Liability Act, and the common law, as declared, interpreted and applied by the Supreme Court of the United States, and other Federal courts, the undisputed facts at the trial proved that said deceased was guilty of negligence which caused, or contributed to cause his death.

3

This court erred in failing and refusing to decide that the evidence introduced at the trial was not sufficient to establish that deceased, D. R. Ferguson, was guilty of negligence as a matter of law, which caused or contributed to cause his death. In so holding, the court decided contrary to the common law as declared, interpreted and applied by the Supreme Court of the United States, and other federal courts.

4

The court erred in deciding that the trial court did not err in refusing, at the request of the appellant, peremptorily to charge the jury to find a verdict in its favor. This was error, because the appellee failed, at the trial to introduce sufficient evidence to authorize the jury to find, as it did, that it was guilty of any negligence which caused, or contributed to cause the death of D. R. Ferguson, the deceased. In so deciding, this court failed to apply to the facts of this cause the provisions of the common law, as that law is declared, interpreted and applied by the Supreme Court of the United States and other federal courts.

5

This court erred in deciding that the evidence introduced [fol. 327] at the trial was sufficient to authorize the jury to find that the alleged failure of appellant's servants in charge of its locomotive, to ring the bell thereon while the train such locomotive was pulling, was passing through the yards at Leesville, Louisiana, was a proximate or contributing cause of the detath of D. R. Ferguson, deceased. This was error, because the evidence introduced at the trial of this cause was wholly insufficient to prove that the failure, if failure there was, so to ring such bell, proximately caused, or contributed to cause the death of the deceased, D. R. Ferguson. Especially was this error, because under the common law, as declared, interpreted and applied by the Supreme Court of the United States and other Federal courts, the evidence at the trial introduced upon this issue, was wholly insufficient to prove, that the failure to so ring such bell, if in fact there was a failure so to do, was a proximate or contributing cause of the death of the deceased, D. R. Ferguson.

6

Because this court erred in failing and refusing to decide that the trial court erred in refusing to set aside the findings of the jury in this cause, and grant the appellant's motion for a new trial of this cause.

7

This court erred in failing and refusing to reverse the judgment of the trial court, and here render judgment in favor of the appellant, because the judgment rendered by the District Court of Bowie County, is, under the law as declared and interpreted by the Supreme Court of the United States and other federal courts, wholly unsupported by any evidence sufficient to authorize the same.

[fol. 328] Wherefore, the appellant here now prays as aforesaid, and that the court grant this motion, and upon a rehearing of this cause, reverse the judgment of the trial court, and here render judgment in its favor, or that at

least, it reverse the judgment of the trial court, and remand the cause to the District Court of Bowie County for another trial.

Messrs. S. P. Jones, of Marshall, Texas, and Kenney & Dalby, of Texarkana, Texas, are attorneys for the appellees.

Respectfully submitted.

King, Mahaffey & Wheeler, Attorneys for Appellant.

[File endorsement omitted.]

In Court of Civil Appeals

[Title omitted]

Order Granting Rehearing—June 24, 1926

This cause came on to be heard on the transcript of the record and appellant's motion for rehearing and the Court having inspected said record and duly considered said motion is of the opinion that the said motion should be and the same is hereby granted.

[fol. 329] In Court of Civil Appeals

[Title omitted]

Opinion on Appellant's Motion for Rehearing—Filed June 24, 1926, in Supreme Court November 18, 1926

After an extended reconsideration of the record it is believed by a majority of this court that the original disposition of this case on appeal should be adhered to, as all the circumstances unite in reasonably indicating that the cause of the deceased being struck and killed by the oncoming engine was as stated in that opinion. The record is far more in harmony with the inference that at the time the deceased was struck by the oncoming train he was sitting or squatting dangerously near the main line track, with

his face towards the cars he had been inspecting, than that the deceased came out suddenly from between the cars on the passing-track and unexpectedly collided with the moving engine on the main line at some moment of its passing. Had the deceased done the latter thing the wounds on his body would necessarily have been of a different character and upon different parts of the body, and his body would not have been projected, as done, some distance in the direction the train was moving. It is true that the engineer and [fol. 330] fireman testified that they were keeping a lookout and did not see Mr. Ferguson or any other man on or near the main line track in going through the yards. Yet the physical facts show that the deceased must have been on or very near the main line track at the time of the passing of the engine; otherwise he would not have been struck and killed by the engine. The blood spots on the pilot beam and the right step, in connection with the injuries on the body of the deceased and the fact that his body was projected forward some distance in the direction of the moving train, all speak for themselves. The more reasonable conclusion is that the operatives of the engine failed to observe the deceased.

The order of affirmance is set aside, and the judgment, as before determined, is reversed and the cause is remanded for trial.

Levy, Associate Justice.

In Court of Civil Appeals

Dissenting Opinion—June 24, 1926

As I understand the case, the jury had a right to find from the testimony that the trainmen violated an established practice when they failed to ring the bell of the locomotive as the train approached the place where the accident occurred. So finding, I think the jury might properly have found, further, that the deceased had a right to rely and did rely upon an observance of the practice on the occasion of the accident; and, having found that, to find, as they did, that deceased was not guilty of contributory negligence as charged against him. I think the proper disposition of

the appeal was made when the judgment of the court below [fol. 331] was affirmed, and respectfully dissent from the conclusion reached by the majority of the members of this court that said judgment should be reversed.

Willson, Chief Justice.

June 24, 1926.

[File endorsement omitted.]

In Court of Civil Appeals

[Title omitted]

Judgment—June 24, 1926

This cause coming on again to be heard on the transcript of the record and appellant's motion for a rehearing, the court is of the opinion that said motion should be granted and that the judgment heretofore rendered on the 18th day of March, 1926, affirming the judgment of the court below should be set aside and the cause remanded to the court below for a new trial.

[fol. 332] It is therefore ordered, adjudged and decreed by the court that appellant's motion for a rehearing be and the same is granted and the judgment heretofore rendered by this court be and is set aside, and the cause is remanded to the court below for further proceedings in accordance with the opinion of this court; that the appellee Leonard Jones, Administrator of the estate of D. R. Ferguson, deceased, pay all cost of this appeal.

It is further ordered by the court that the officers of this court and the court below do have and recover of and from the appellant, Kansas City Southern Ry. Co. and of the American Surety Company of New York, surety upon appellant's supersedeas bond, all cost incurred by said appellant on this appeal, for all of which execution may issue and this decision be certified below for observance.

IN COURT OF CIVIL APPEALS

[Title omitted]

ORDER SUBSTITUTING FRANKLIN JONES AS ADMINISTRATOR—June 24, 1926

This cause came on to be heard on the transcript of the record and Franklin Jones' motion to be substituted Administrator of the Estate of D. R. Ferguson, deceased, and the Court having inspected said record and duly considered said motion is of the opinion that the said motion should be and the same is hereby granted.

[fol. 333] IN COURT OF CIVIL APPEALS

[Title omitted]

APPELLEE'S MOTION FOR REHEARING—Filed July 9, 1926; in Supreme Court December 8, 1926

Now comes appellee, Franklin Jones, Administrator of the estate of D. R. Ferguson, deceased, and moves the Court to set aside the judgments heretofore rendered in this cause reversing the judgment of the trial court and remanding the case to the trial court for new trial; and moves the court to affirm the judgment of the trial court, for the reasons hereinafter assigned.

Foreword

This case has given the court a great deal of trouble; and yet, it is the fault of the court and not of the case.

For so long a time, and with such unvarying industry and consistency, this court has kept within its province of declaring the law upon facts found, that it has become, concededly, the strongest court in the State. We do not make this statement to flatter, but to illustrate. We attribute, in great part, the soundness of the court to its willingness to apply settled principles of law to an ascertained set of facts, without wandering into the forbidden realm of conjecture about the meaning of the evidence transposed into [fol. 334] a statement of facts. In the case at bar, the

court has found facts to exist without evidence or circumstances to justify such finding; and in the face of the agreement of counsel for both parties that the affirmative evidence utterly precludes the truth of the facts so found by the court. And this is done with an opinion in the record affirming the judgment, written in response to a petition for rehearing which concedes that the court was wholly "inexcusable" for having overlooked the pertinency of testimony which entirely refutes the findings reaffirmed in the last opinion. And in such last opinion, the court concedes by the language it uses, that it had to carefully weigh and "harmonize" the facts to reach its conclusion; and this was without the province of the court, and within that of the jury.

Side by side, we quote the language of the court in the opinions (both written after a most careful consideration of the direct question involved) filed on motions for rehearing:

Opinion Filed March 18, 1926	Opinion Filed June 24, 1926
"If the engineer and fireman are to be believed, and no reason appears why they should not be, then the deceased for an appreciable period of time prior to his injury was not knowingly standing and remaining in a position to be struck by the oncoming train, having time to avoid being struck by it. Hence it is thought after all the substantive evidence had been considered, that the ultimate question of negligence vel non on the part of the deceased contributing to his injury remains in the domain of open fact for decision by the jury. There is proof rendering probable the existence of the fact, as	"The record is far more in harmony with the inference that at the time the deceased was struck by the incoming train he was sitting or squatting dangerously near the main line track, with his face towards the cars he had been inspecting, than that the deceased came out suddenly from between the cars on the passing track and unexpectedly collided with the moving engine on the main line at some moment of its passing. * * * * * * * The more reasonable conclusion is that the operatives of the engine failed to observe the deceased."

was found by the jury, that [fol. 335] the deceased did not 'carelessly or while intoxicated place himself in such position upon or near the main line track that he was struck and killed by an incoming passenger train.'"

"In harmony with the inference." "The more reasonable conclusion."

When "there is proof rendering probable the existence of the fact," whose duty, as between court and jury, is it to "harmonize" and deduce the "reasonable conclusion" from such proof? In this case, the jury did both harmonize the evidence and deduce facts reasonably concluded therefrom. And of their action, the court has said:

"It is not difficult to conceive that the deceased must have stepped in the path of the engine at some moment of its passing," and again—"The inference is allowable that the deceased must necessarily have stepped quickly in the way of the engine from some cause, coming from somewhere near the engine."

Without any regard to the case at bar, we earnestly beg the court to hew back to the line and forget its little excursion into the forbidden realm of fact. Juries are fallible. But we have selected that way to manage our business; and nowhere has our right to so manage it been more jealously guarded than by this court. On occasion, other courts have dealt with the facts—but not with all of them. This court has at least been frank about the matter and fairly stated the testimony and declared that it made an issue of fact. This makes the precedent the more dangerous.

Had the court followed its heretofore invariable practice of accepting the facts as found by the jury upon disputed issues, and applying the law thereto, this case would have presented no difficulties. If the court will hark back to the rule invariably followed heretofore, the case will present no difficulties.

[fol. 336] The appellee presents the following assignments of error:

First Assignment of Error

This court erred in holding that under the facts found by the Court of Civil Appeals the decedent Ferguson was guilty of contributory negligence as a matter of law.

Second Assignment of Error

This court erred in holding that the finding of the jury that deceased, D. R. Ferguson, was not guilty of contributory negligence was not supported by the evidence, and erred in finding as a matter of fact that D. R. Ferguson was guilty of contributory negligence as a matter of law and of fact, in that he was not engaged in his work up to the moment of his death; and that at the time he was struck by the locomotive, that D. R. Ferguson was sitting or squatting near the ends of the ties on the east side of the main line. This finding is not only contradicted by circumstances, but it is contradicted by direct evidence, and is unsupported by any evidence whatever.

Third Assignment of Error

This court erred in disregarding the fact conceded in the trial court, and insisted upon by both appellant and appellee on appeal:

That Ferguson was in an erect position, and that the injury to his torso was caused by the pilot beam of the engine. That he in some manner came into a position where, while standing upright near the track, he was struck upon the torso, by the pilot beam of the engine which killed him.

Fourth Assignment of Error

This court erred in infringing upon the right of the jury to decide disputed facts by disregarding the finding of fact by the jury upon disputed issues of fact; and in find-
[fol. 337] ing the facts to be otherwise than as found by the jury upon such disputed issues.

Fifth Assignment of Error

This court erred in inferring that the engineer and fireman failed to observe the decedant Ferguson because such inference is necessarily based upon the further inference that Ferguson was sitting or squatting so near the track that a passing engine would strike him; and because the inference that the engineer and fireman failed to observe Ferguson sitting or squatting upon or near the track is refuted by positive and direct testimony that they looked at the place where he was killed as they approached the place, and carefully observed the surroundings of such place and did not see Ferguson there.

Sixth Assignment of Error

This court erred in finding that there was no sufficient evidence to support the jury finding of fact that the decedent Ferguson was blinded by the failure to dim the engine headlight.

Seventh Assignment of Error

This court erred in finding it to be a fact that there was insufficient evidence to support the jury verdict that the violation of the Federal Safety Appliance regulations in regard to dimming engine headlights was a proximate cause of decedent Ferguson's death.

Eighth Assignment of Error

This court erred in finding as a fact that the speed at which the engine was running at the time of killing Ferguson was not a proximately contributing cause of his death.

[fol. 338] Ninth Assignment of Error

This court erred in finding as a matter of fact and law that the evidence was not sufficient to sustain the finding of the jury that the failure to blow the whistle was an efficient proximate cause of D. R. Ferguson's death.

Tenth Assignment of Error

This court has erred in reversing and remanding the entire cause for a new trial, in that under the findings of the Court of Civil Appeals, the error "affected part only of the matter in controversy and the issues are severable," and the cause should only be reversed and remanded on the question of damages assessed, for the purpose of permitting the trial court to try and determine the amount that should be deducted on account of the contributory negligence of the deceased.

* * * * * * *

Second and Third Assignments of Error

The appellee links and combines his second and third assignments of error (p. 5 of this Motion) into the proposition, that:

The parties to this suit having conceded, and tried the case upon the theory, that Ferguson was in an erect position when his torso was struck by the pilot beam, and there being evidence to support that theory of his injury, this court has erred in disregarding the conceded facts and in holding that the findings of the jury to the effect that Ferguson was not guilty of contributory negligence, was not supported by the evidence.

The appellee consistently contended that Ferguson's torso was struck by the pilot beam. The appellant has solemnly agreed to this and declared that he was not sitting [fol. 339] or squatting on or near the track, saying:

"There was no evidence introduced at the trial from which the jury, or the court, could reasonably find that deceased was sitting or squatting dangerously near the *the* track at any time when the engineer and fireman, by keeping a diligent lookout, as they did, could have seen him."

And it further asserted in its first Motion for Rehearing (p. 4) that he was "struck by the pilot beam of the locomotive."

The members of this court certainly appreciate the fact, discovered by all attorneys and judges who have had ex-

perience in the trial court, that the parties, as in this case, frequently take a position with reference to certain theories of the case, that really dispenses with the necessity of introducing any considerable volume of testimony on the particular point.

This practice, applied to the present case, is clearly disclosed in the fact that by reason of the nature of the wounds on the deceased and the amount of blood found on the pilot beam, it was accepted by both litigants as a settled fact, and the case was tried on the theory, that the deceased was in an erect position when struck by the pilot beam and the injuries inflicted upon him which caused his death.—Yea, it is plain to anyone that neither party contended otherwise than that the pilot beam inflicted the injuries to Mr. Ferguson's torso.

This theory of the case so forcefully presented in the Motion for Rehearing (of the first opinion of this court) prepared by our former but now lamented partner, was emphasized by the contention made by the appellant in its Motion for Rehearing (of the same opinion), and we deem it well to here call this court's attention to the language [fol. 340] used by the respective parties to this lawsuit with reference to those facts.

In our Motion for Rehearing of the first opinion in this case as appears on pp. 4 and 11, we used the following language:

"The engineer and the fireman both testified unqualifiedly that they were keeping a sharp lookout until the engine passed the lantern, and did not see any object on the track or between the tracks (S. F. 84, 89, 96-97, this Motion p. 11). This evidence was uncontradicted. If Ferguson had been on or near the track, they must have seen him. It is conclusive that he must have stepped from between two cars or from the end of the string of cars after the engine had gotten so close to the place where he was struck that the front end thereof hid him from view."

Then follows excerpts from the testimony, statements, illustrations and physical facts up to and including all of p. 10 of the said Original Motion for Rehearing (of the first opinion); and on p. 11, the writer of that Motion for Rehearing again says:

"In view of the fact that we have a logical explanation disclosed by the testimony that points inevitably to the conclusion that the end of the pilot beam crushed the hole in his body, and that it has never been seriously contended by anyone, until this court advances the thought, that he was struck first by the step and the hole cut in his body and his head struck by the pilot beam, we are driven to the inevitable conclusion that he must have been struck by the pilot beam which inflicted the injury to his torso, and the further conclusion that his injuries could not have occurred in any other way.

"The conclusion that Ferguson was sitting or squatting near the end of the ties is again positively contradicted by the testimony of the engineer, who said:

" 'In going through that yard, I was keeping a lookout. * * * I did not see Mr. Ferguson or any other man on or near the tracks in going through the yards that night. I did see a lantern in the yard there at Leesville. I saw a car repairer's lamp sitting on the ground between the tracks, betwen the main line track and track No. One, supposed to be the passing track, but I did not see Mr. Ferguson or any other man there about the lantern, no man about this light whatever. * * * I can see the ground within a few feet of the end of the pilot.' (S. F. 84.)"

The writer of that Motion for Rehearing said on p. 11, with reference to the testimony of the fireman:

[fol. 341] "The fireman testified:

" 'I was keeping a watch ahead in going through Leesville that night, but I did not see any man on the tracks or near the tracks as we were passing through the yards. The headlight was giving a good light, so that I could see along the track, through the yard there. I saw a lantern as I went through the yard there, between the main line and the passing track.' (S. F. 96.)

"He testified further:

" 'I was about between a quarter and a half a mile from this inspector's light when I first saw it. The engineer could see it about as far as I could, one could see it as far

as the other. I went right on by it and into the station and did not see anybody.' (S. F. 97.)

"The above quoted testimony (which was not contradicted) shows, it seems to us, that if Ferguson had been sitting or squatting on the ends of the ties or near the ends of the ties, that the engineer and fireman would most certainly have seen him. They were keeping a lookout, according to their testimony, and a very careful lookout, if they are to be believed, and the jury had the right to believe this part of their evidence, for they saw the lantern a distance of a quarter of a mile before they reached it. Certainly, if they saw the lantern for that distance, if a man had been sitting or squatting on the ties or near the ties, they must have seen him, as a dark object is more readily seen in a bright light than is another and weaker light. The evidence was so conclusive that Ferguson was not in a position to be seen as the train approached that neither plaintiff nor defendant requested a finding as to whether the engineer or fireman should have seen him."

The appellant, in its Motion for Rehearing of that same opinion (pp. 3-4), stressing the fact that it was conceded and accepted as a fully established fact, used the following language:

"The engineer and fireman were keeping a lookout and so long as they could see about the place where the deceased was struck, he was neither upon the track, nor so close thereto as to be in danger of being struck by the locomotive. There was no evidence introduced at trial from which the jury, or the court, could reasonably find that deceased was sitting or squatting dangerously near the track at any time when the engineer and fireman, by keeping a diligent look-[fol. 342] out, as they did, could have seen him. The circumstantial evidence in this case points, in our opinion, to the fact that the deceased, while under the influence of liquor, and being grossly careless and negligent, and having no regard for his own safety, and while the locomotive was passing over that part of the track near which he was, either walked or stumbled so close to the track as to be struck by the pilot beam of the locomotive."

The writer can conceive that if the appellant and the appellee should both mis-cite the testimony of witnesses and

reach a joint conclusion in conflict with the evidence, or if they should take a position that was contrary to the undisputed evidence in the case, this court would have the right to declare itself unbound by the agreement or attitude thus taken by the parties, and declare the facts to be as disclosed by the evidence. However, when, as in this case, the position taken by the appellant and by the appellee with reference to the manner in which the injuries were inflicted, and with reference to the construction to be placed upon the testimony as a whole on this point, is not inconsistent with the facts to the extent of being in conflict with the undisputed facts, we respectfully submit that it is the duty of this court to accept the conclusion thus reached and announced by the respective parties to the suit and dispose of the question in harmony with the position taken by the parties. The court should no more interfere with the agreement thus reached by the parties as to the facts than it would if it had been solemnly stated in a written agreement signed and filed as a part of the proceedings on the trial of this cause.

It occurs to the writer that this court should pause, stop and take its bearings, and realize that if the appellant had stated as a part of the undisputed facts in this case in its [fol. 343] original statement of the nature and result of the case, that Ferguson was in an erect position, and that the pilot beam of the engine struck his torso and inflicted upon him the injuries which resulted in his death, and if the appellee had accepted that statement as true by declining to contradict in his statement of the case, this court would have been bound to have accepted such statement of the case as true and to have proceeded accordingly. Now, is the force of this rule lessened by the fact that the appellee makes the statement and appellant accepts the same as true, or by the fact that it is a conclusion reached by the open signed declaration of each party to the suit in different papers instead of being embodied in one paper?

This case presents the further anomaly that the appellee complains of the failure of the appellant to dim the very bright headlight, and the appellant emphasized the fact that it did not dim it and that it had a very, very bright headlight indeed, and that it was very necessary to have such a headlight so as to be able to see up and down the

track, and with much gusto, it then contends that if Ferguson had been on the track, the engineer would have seen him, and that he was not on the track because the fireman and the engineer did not see him, and the appellee agrees that the engineer and the fireman did not see him because he was not there to be seen; and yet, this court, without a particle of evidence other than such theories as it can draw upon its imagination to establish, solemnly finds and declares that Ferguson was on the track, could have been seen by the engineer, but for some unexplainable reason, it refuses to accept the sworn statements of the appellant's engineer and fireman, the solemn declaration made by the appellant's attorneys in its motion for rehearing, and the earnest if not forceful contention presented by the appellee, [fol. 344] all to the effect that Ferguson was not on the track, was not in a stooping or sitting position when struck, that the pilot step did not strike him, but that the wound inflicted to his torso was by being struck by the pilot beam.

This court places itself in a rather peculiar, if not awkward, position when it says that though the appellant declares that it relies upon the truthfulness of the testimony of its engineer and fireman upon a certain point, and though the appellee declares that he relies upon the truthfulness of the testimony of the engineer and the fireman on the particular point, and though there is no contradictory evidence, no other explanation, no other witness testifying on that point, still assumes the role of ferreting out the truth and reaching a conclusion wholly inconsistent with the theory upon which the case was tried. This becomes a much more peculiar situation for the court to find itself in when it is so easily discoverable by the application of any of the rules of physics or science known to us, the court cannot sustain the contention made in the position it has taken.

The appellant alleged in its answer that Ferguson's duties required him "to go between, over and across the tracks." We think that we are justified in emphasizing to this court the fact that Ferguson would not have been guilty of contributory negligence by sitting on the ties or in squatting on or near them, any more than he would have been in crossing the track or walking upon the track

while at or near his post of duty. If he was guilty of contributory negligence, it was in remaining on the track until he was struck. The question of whether he was guilty of contributory negligence in that respect, even if it were conceded that he was on the track sitting or squatting, must [fol. 345] necessarily be disposed of as an issue of fact, for the reason that the evidence disclosed that the failure to ring the bell and other explanable reasons may have induced him to overlook and fail to appreciate the dangerous proximity of the train, until it was too late.

The court, in its original opinion, declares, after having stated that Ferguson was seen at the north end of a string of cars, that he had already inspected those cars and that therefore, he was engaged in no other work for the next twenty minutes preceding his death. Doubtless, the court reaches that conclusion by reason of the fact that the lantern was in the same position between the tracks after Ferguson was killed as it was when he was last seen alive—that is to say, if we conclude that he was last seen alive by the Barnhill boy and others; but, it does not appear that his lantern was in the same spot north and south, simply in the same spot relatively speaking, east and west—that is, half way between the tracks. Now, it is not inconsistent with the evidence and the facts to be inferred from the evidence in the case to reach the conclusion that Ferguson had returned to his work of inspecting. The only evidence of the cars having been inspected before the boys saw him and his lantern remained in that position, or whether some of the cars were inspected after the boys saw him, and as to whether Mr. Thorla saw him walking north along the string of cars just a few minutes before he was killed, and as to whether he had picked up his lantern after the boys saw him and carried it to another place between the two tracks and set it in the same position and had gone between the cars to do some little work or inspection [fol. 346] or connect up the hose is not definitely shown by the testimony, but the inference does arise that during that time, he was not engaged in any conduct which would constitute negligence upon his part proximately resulting in his death.

The court, in its original opinion, seems to lay some stress upon the fact that the train made a great deal of roaring noise and that a very bright headlight was shining down

the track and that the deceased should have gotten out of the path of danger before the train arrived. This process of faulty reasoning seems evident to anyone who will think for a moment. Suppose it was true that the deceased, while waiting in the line of his work, sat down on the end of a cross-tie rather than stand and rest his hand against a car "in this fifteen minutes before the train arrived, expecting that other cars would soon be sent down and his work would be resumed," what crime has he committed in doing so? Probably, he assumed, if he did that, that other cars would be sent in in a few minutes and that he would be up inspecting them before the passenger train arrived. It is not at all probable, it is not inferable, that the deceased kept a [illegible] on the time that was passing and knew exactly when the passenger train was due, but suppose that he heard the roaring of the passenger train, and that by reason of the fact that he had the right to assume that it would on this occasion, as it had done before, come alone there on its good behavior ringing the bell to advise him of its nearness before it reached the point of close proximity, and that he hesitated from moving his tired body from the end of the tie, lulled into a sense of security by reason of the bell not having been rung—until he was not able to extricate himself from the situation without being injured. Under these circumstances, the failure to ring the [fol. 347] bell being actionable negligence which proximately caused his injury, it cannot be said, as a matter of law, that his failure to jump from the track at the first knowledge that the train was approaching, though not near, constitutes contributory negligence as a matter of law.

First Assignment of Error

This court erred in holding that under the facts found by the Court of Civil Appeals the decedent Ferguson was guilty of contributory negligence as a matter of law.

Statement and Argument

In the last opinion filed herein on June 24, 1926, the court has said:

"The record is far more in harmony with the inference that at the time the deceased was struck by the oncoming

train, he was sitting or squatting dangerously near the main track, with his face towards the cars he had been inspecting, than that the deceased came out suddenly from between the cars on the passing-track and unexpectedly collided with the moving engine on the main line at some moment of its passing."

Since the court has taken that position, we are forced to argue the case under this assignment as though the facts found were true.

Consider, therefore, that while waiting for other cars to be kicked down to him for inspection, Ferguson had moved away from the train he was inspecting and seated himself upon the end of the cross-tie of the main track or squatted near enough thereto to be struck by a train in passing over that track. When he took that position, in the language of this court, he "had the right to rely" upon "the practice to keep the bell ringing in going through the yards." The court says in its opinion:

"It was admittedly proven that it was the practice to keep the bell ringing in going through the yards, and that as found by the jury, the bell was not rung in this instance. The deceased had the right to rely upon such practice."

[fol. 348] Assuming these facts to be true, we therefore have Ferguson in a position dangerously near the main line track, relying and having the right to rely upon the custom of the defendant to warn him of the approach of its train by ringing a bell. A train running twenty-two, three or four miles an hour did approach him and struck and killed him without giving him the warning which he was relying upon and which he had the right to rely upon to protect himself against the train. Was he guilty of contributory neglect? We think not. Certainly, the issue is not so definitely foreclosed as to deprive the jury of passing upon it as an issue of fact.

This exact question has been decided by the Galveston Court of Civil Appeals in the case of Payne, Agent, vs. Doubtful, 236 S. W., 134, and the Supreme Court of the State has denied a writ of error in such case.

In that case, an employee of a tie company engaged in loading ties upon the defendant's railroad train, was injured by the operators of such train starting it while he

was crossing between the tender and a box car to get drinking water. The evidence showed that it was always customary for the operatives of the train to ring the bell before starting it in order that everyone employed about the train might get out of the way and to a place of safety. On the occasion in question, the operatives failed to ring the bell, and injured the employe of the tie company between the cars. The court held that the employe was not bound to anticipate that the railroad company who owed him a legal duty to warn him by ringing the bell would negligently fail to discharge it; and that the question as to whether or not such employe was guilty of contributory negligence in going between the cars was a question for the jury because of the failure of the train crew to ring [fol. 349] the bell before starting the train. In refusing a writ of error on that case on March 1, 1922, the Supreme Court affirmed that statement of the Galveston Court of Civil Appeals as good law. It is the same rule forcefully and briefly expounded by the Chief Justice of this court in his dissenting opinion. In the case at bar, the defense is that Ferguson may not recover herein because of his contributory neglect in "knowingly placing himself too near its mail line track and moving train." In the Doubtful case, Judge Graves says:

"Appellant's sole contention for contributory negligence here is that it resulted from Doubtful having chosen the way he did when there was another and safe way open to him. The trouble with this position as applied to these facts, is that it wholly ignores the fact that the way he chose was as safe as any other so long as the train remained stationary and only became unsafe when it started without the prior warning he had a right to expect and rely upon."

According to the findings of this court, Ferguson put himself in an unsafe position in the performance of his duties. Is the court further justified in holding that in so placing himself he was guilty of contributory negligence as a matter of law?

Discussing these questions in the case of Payne vs. Doubtful, just referred, to the court said:

"In these circumstances, and merely because he did not select another way which might have proved safe, we do not think the appellee was guilty of contributory negligence as a matter of law, but that the question was clearly one for the jury. We cite the following authorities as supporting this conclusion: Missouri, O. & G. Ry. Co. vs. Dereberry, 167 S. W. 30 (writ of error refused); Weatherford, M. W. & N. W. Ry. Co. vs. Thomas, 175 S. W. 823 (writ of error refused); Blair et al. vs. Jefferson & N. W. Ry. Co., 214 S. W. 936; Rio Grande E. T. & S. F. Ry. Co. et al. vs. Guzman, 221 S. W. 1102 (writ D. F. W. J.)."

[fol. 350] The evidence in this shows that Mr. Ferguson was killed after dark. Some time before he was injured, and at the very time of his injury, switch engines were engaged in making up trains in the yards, and one or more switch engines were making up a train which Mr. Ferguson was inspecting as it was put together. The defendant affirmatively pleaded that the yards had numerous tracks which were in constant use in making up trains (Trans. p. 13). The Federal Safety Appliance laws require that all of these trains carry headlights of the same general kind and character as that carried by the train which killed Mr. Ferguson. The testimony on p. 21 of the Statement of Facts is undisputed that a man could not tell the distance a train was from him with that kind of a headlight shining brightly, but he could come nearer telling the distance the train was from him if the light is dimmed. The light was not dimmed in this instance. It is therefore wholly unjustifiable for the court to assume that even though Ferguson saw the headlight, that he knew it was the headlight of an approaching passenger train; or that he knew it was in near proximity to him. Ferguson knew that it was the custom of the train which killed him to blow when entering the yard, and to ring the bell as it proceeded through the yard. Until he heard those signals, he had the right to assume that any other light he saw was the light of a switch engine working in and about the yard; and that is probably what he did assume if he saw the light at all. Of course, in making this argument, the court understands that we do not recede from our position that Ferguson was between the cars of the train which he was making up when

the light of the passenger train which killed him approached. However, we are taking the facts as the court has found them and arguing them on that basis. It is af- [fol. 351] firmatively pleaded that switch engines were constantly working about the yard, making up trains, and it is undisputed that cars were being moved into a train which Ferguson was inspecting; and it is agreed that it was dark, and the court is justified in assuming that such engines bore headlights on each end as required by the Safety Appliance regulations.

The Court, after discussing the evidence, says:

"Then why did he remain so near the track after he could hear the train and see the light in ample time to step away?"

The answer to that is simple. Other movements of trains were going on in the yard, and any movement of a train that he heard and any light of an engine that he saw, Ferguson attributed to other trains engaged in switching because he had not heard the whistle of the passenger train, nor did he hear the bell, which we assume he was listening for. We counter the court's question with another question: "Why should he remove himself from his position?" He was surrounded by engines and cars in operation, all equipped with lights and all making noise. He realized probably, as the court has found, that a passenger train was due to come through the yards about that time. But he also knew that that train would blow a whistle upon entering the yard, and that it would ring its bell in passing through the yard; and until he heard such signals, he very properly assumed that any other noises he heard were made by the operation of other engines and cars in the yard. If he saw the light along the track where he was standing, he doubtless assumed that it was the light of some switch engine; and being advised of the character of work being done by the switch engines and the cars to be placed by them, he realized that there was no danger from [fol. 352] a switch engine, because no cars were being placed upon the main track where he was standing. Whether the switch engines went onto the main track or not does not apear, but they doubtless did do so, and when on that track, their lights shone down to the point where Ferguson was.

He, however, understood that no cars were to be placed upon the main track, and knew that no engine engaged in switching would come as far down as where he was standing, and therefore, paid on attention to such light.

In its original opinion in this case, the court said:

"We are not disposed to deny to the deceased the benefit of that rule so often announced that the jury may assume from the instinct of self-preservation that a person is diligent to escape injury."

We ask that the court, therefore, indulge that assumption, or rather, permit the jury to so indulge it; and that it add thereto, the statement of the court itself in its second opinion, as follows:

"If the engineer and fireman are to be believed, and no reason appears why they should not be, then the deceased for any appreciable period of time prior to his injury was not knowingly standing and remaining in a position to be struck by the oncoming train, having time to avoid being struck by it. Hence it is thought, after all the substantive evidence had been considered, that the ultimate question of negligence vel non on the deceased contributing to his injury remains in the domain of open fact for decision by the jury. There is proof rendering probable the existence of the fact, as was found by the jury, that the deceased did not 'carelessly or while intoxicated place himself in such position upon or near the main line track that he was struck and killed by an incoming passenger train'."

Fourth Assignment of Error

This court erred in infringing upon the right of the jury to decide disputed facts by disregarding the finding of fact by the jury upon disputed issues of fact; and in finding the facts to be otherwise than as found by the jury upon such disputed issues.

[fol. 353] Statement and Argument

To justify this assignment, we refer the court to its own findings of fact in the opinion rendered herein affirming the judgment.

The court has found, in its most recent opinion reversing and remanding the case, that:

"The record is far more in harmony with the inference that at the time the deceased was struck by the oncoming train, he was sitting or squatting dangerously near the main line track with his face towards the cars he had been inspecting, than that the deceased came out suddenly from between the cars on the passing-track and unexpectedly collided with the moving engine on the main line at some moment of its passing. * * * The more reasonable conclusion is that the operatives of the engine failed to observe the deceased."

This is going to considerable length in basing an inference upon an inference. The court first infers that Ferguson was sitting or squatting beside the track and upon that inference bases the second inference that the engineer and fireman who swore that they were looking directly at the point where Ferguson was and did not see him though they saw his lantern, failed to observe the deceased. What possible justification can the court have for making the statement that "the more reasonable conclusion is that the operatives of the engine failed to observe the deceased", when the court, in its opinion affirming the judgment, has quoted the testimony of the engineer and fireman? Discussing this testimony, the court has said that there is no reason why the engineer and fireman should not be believed; and that if believed, that it is unquestionably true that the deceased for an appreciable period of time prior to his injury was not in a position to be struck by the oncoming train. Discussing the evidence of the fireman and engineer, the court had said that it is of a character to leave the question of the decedent's contributory neglect in the domain of open [fol. 354] fact for decision by the jury. The court has designated the proof of those two witnesses, the engineer and fireman, as sufficient to render probable the existence of the fact as was found by the jury that the deceased did not carelessly or while intoxicated place himself in such position upon or near the main line track that he was struck and killed by an incoming passenger train. Why then, with such evidence in the case, is it necessary to indulge in inference at all? Why infer that the deceased was "sitting or squatting dangerously near the main line track with

his face towards the cars he had been inspecting", when the testimony of the only two living witnesses who are in the position to say whether or not he was so sitting, shows conclusively that if he had been in that position, they would have discovered him by the outlook which they maintained; and that they maintained the outlook and did not discover him? Why indulge in inference at all when the facts are sworn to by testimony which the court itself says there is no reason to disbelieve?

When the writer undertook to brief this petition for rehearing, he had not seen a brief heretofore prepared and filed by Mr. Leonard Jones. At the outset, he undertook to discuss all the circumstances in connection with the killing of Mr. Ferguson; but before dictating his views, found and read a brief filed by Mr. Leonard Jones. That brief expresses the writer's views exactly. Before having seen it, he had confirmed every statement of fact made therein. He does not believe that the argument in that brief of the facts and circumstances can be refuted.

The court has said:

[fol. 355] "The inference is allowable that the deceased must necessarily have stepped quickly in the way of the engine for some cause, coming from somewhere very near the engine".

This is absolutely the only inference deducible from the evidence of the engineer and the fireman. It is certain from their testimony that they did not see Ferguson on the track; and that inasmuch as they saw his lantern right at the point where he was killed, that they would have seen him had he been there. We do not believe that the court is justified in taking the evidence as to the location of the wounds to Ferguson's body and deducing facts therefrom absolutely at variance with the only sworn testimony in the case which the court itself says should be believed. How injuries are received cannot always be told, even by the person receiving them. This was evidence in a case which the writer once heard tried in the police court, where a negro badly battered up in a general fight among a number of negroes was examined at length with a view to ascertaining who was guilty of injuring him and who the parties to the affray actually were. The witness denied for some time that he was able to tell who had struck him, and

finally, in desperation, turned to the prosecuting attorney and said: "Boss, if you was to back up against a buzz-saw, could you tell which tooth cut you"? It is inconceivable that this court will permit a theory to govern it as against the sworn testimony of the engineer and the fireman in this case. The facts are such that there there can be no mistake about them. The testimony is all one way and undisputed. The man Ferguson was not on the track as the engine approached the point where he was killed. Someway, somehow, he got close enough to the track to be killed by the engine; but he was not killed by the engine while sitting or squatting near the track—if the testimony of the human witnesses who saw the accident can be be-[fol. 356] lieved, and the court says it should be.

As to just how Ferguson managed to get in the position in which he was killed, we will never know. As to how he was killed, the jury were tolerably well satisfied, judging by their answers to the special issues submitted to them, that he was misled into the belief that the train was not approaching (at least, not in dangerous proximity), because it neither blew the whistle nor rang the bell; and that he was confused by the glaring headlight, probably combined with the speed of the train, and misjudged the distance the train was from him, if he saw it at all, by reason of the glaring headlight; and misjudged the time within which it would reach him, because of the excessive rate of speed at which it was running. That the jury was justified in these conclusions, the court has heretofore affirmed in this language:

"And the circumstances are not entirely unfavorable to the presumption that the deceased had mistakenly stepped in the path of the engine due to deep confusion from some cause."

Sixth Assignment of Error

The court erred in finding that there was no sufficient evidence to support the jury finding of fact that the decedent Ferguson was blinded by the failure to dim the engine headlight.

Seventh Assignment of Error

This court erred in finding it to be a fact that there was insufficient evidence to support the jury verdict that the

violation of the Federal Safety Appliance regulations in regard to dimming engine headlights was a proximate cause of decedent Ferguson's death.

Eighth Assignment of Error

This court erred in finding as a fact that the speed at which the engine was running at the time of killing Ferguson was not a proximately contributing cause of his [fol. 357] death.

Statement and Argument Under Sixth, Seventh and Eighth Assignments

The writer does not know whether or not members of this court have ever driven at night over Texas roads prior to the time that the headlight dimming law went into effect. However, the writer has done so, and he makes the unqualified statement that driving at night and approaching a glaring headlight, he is utterly unable to estimate whether that light is one-half mile away, one-quarter mile away or one hundred yards away. That the writer's experience with glaring headlights is not at all unusual is best evidenced by the fact that the Legislature of every State in the Union has endeavored, by legislation, to eliminate the glaring headlights of automobiles on roadways and penalize the users of same. The writer lives in the country fifteen miles south of Marshall, and goes back and forth to the office every day. Prior to the passage of the law requiring the elimination of glaring headlights, he rarely passed over that road in the morning without finding from one to three automobiles ditched, each accident being due to glaring headlights. Each morning, the road was strewn with dead dogs, cats, rabbits and other animals blinded by the lights from automobiles and so confused that they could not escape. The evidence in this case is that the headlight on the engine which killed Ferguson was brilliant at a distance of 1,500 feet ahead of the engine. That is a quarter of a mile or more. In view of the legislation against glaring headlights on automobiles, the court should take judicial knowledge of the fact that a person is utterly unable to locate a glaring light which will illuminate the road

ahead of him for 1,500 feet. Such is the evidence in this [fol. 358] case—the uncontroverted evidence (Statement of Facts p. 21). That being true, the speed of the train becomes the most important factor in the accident which resulted in the death of Ferguson. If Ferguson believed the light which he saw, if he did see it, to be 1,500 feet distant and believed, from his knowledge of the train, that it was running at a rate of speed just one-half of that at which it was running, then Ferguson had twice as much time to remove himself from a point of danger than if the train was running at double the usual speed. He was utterly unable to tell whether the train was 5,000 feet or 1,500 feet away from him. If it was 500 feet away from him, he only had about one-third of the time to remove himself out of danger that he would have had, had the train been 1,500 feet away from him.

At the risk of appearing tedious, we again call to the attention of this court that under the uncontroverted evidence, the Railway Company had voluntarily established a custom of ringing the bell, which the jury certainly had the right to find lulled Ferguson into a sense of security which caused him to think (and in doing so, he was guilty of no negligence) that the train was far away, and he was thereby induced to remain (if it be true that he was in a place of danger) until it was too late for him to escape.

Fifth Assignment of Error

This court erred in inferring that the engineer and fireman failed to observe the decedent Ferguson because such inference is necessarily based upon the further inference that Ferguson was sitting or squatting so near the track that a passing engine would strike him; and because the inference that the engineer and fireman failed to observe [fol. 359] Ferguson sitting or squatting upon or near the track is refuted by positive and direct testimony that they looked at the place where he was killed as they approached the place, and carefully observed the surroundings of such place and did not see Ferguson there. (And the further fact that both parties—appellant and appellee—assumed he was not there.)

Statement and Argument

The above assignment needs no argument except a reference to what the court has done. The jury, counsel for appellant and counsel for appellee and the court, by an undivided court, have heretofore found that the evidence justified the conclusion that Ferguson was deeply confused for some reason and walked into the train. However, the court has changed its views, and now, in its opinion, says:

"The record is far more in harmony with the inference that at the time the deceased was struck by the oncoming train, he was sitting or squatting dangerously near the main line."

This inference is directly opposed to the positive testimony of the engineer and fireman, who say that they were looking at the place where Ferguson was killed as they approached it, and that they did not see him. As to the testimony of the fireman and engineer, the court further infers:

"That the more reasonable conclusion is that the operatives of the engine failed to observe the deceased."

The court therefore infers that Ferguson was sitting or squatting by or near the track, and bases its inference upon a further inference that the engineer and fireman failed to observe him, though both of them say that they were looking at the place where he was killed as they approached it, and did not see him. It would be a useless waste of time to cite authorities to sustain this assignment. The rule is as familiar to the court as any other well-known rule.

[fol. 360] Tenth Assignment of Error

This court has erred in reversing and remanding the entire cause for a new trial, in that, under the findings of the Court of Civil Appeals, the error "affects part only of the matter in controversy and the issues are severable," and the cause should only be reversed and remanded on the question of damages assessed, for the purpose of permitting the trial court to try and determine the amount that should be deducted on account of the contributory negligence of the deceased.

The original opinion in this case, as well as the third opinion, which, for the second time, reverses this court in the same case, proceeds upon the theory that the case should be reversed and remanded for the sole reason that the verdict is excessive. In fact, that is the only reason for reversing the case, it being said that the findings of the jury are otherwise satisfactory, and that by reason of the verdict being excessive in that no deduction was made on account of the contributory negligence of the deceased that the court is without authority to require a remittitur.

Inasmuch as the case is reversed solely by reason of the fact that some deduction was not made on account of the contributory negligence of the deceased, why should this entire case be sent back for another trial? Why should not that question, and that question alone, be referred back to the trial court for a disposition thereof by a jury, if a jury be demanded, for the settlement of that question?

[fol. 361] I am not unmindful of the fact that it is generally conceded that it is very uncertain what force and effect should be given to Rule 62a, if in fact any, especially in the light of subsequent decisions; but, all fair minded men must be impressed with the advisability if not necessity of some improvement in bringing about the final end of litigation—in fact, a great many of us believe that is one of the most important things connected with a lawsuit. Here is a case that was brought in the District Court of Bowie County, and before it could be tried, it was transferred to the Texarkana Court at Law, where it reposed until the Supreme Court decided that court was unconstitutional, and it was then transferred back to the District Court of Bowie County. It is true that on one trial, there was a hung jury, but we are nevertheless confronted with the fact that more than four years have elapsed since Mr. Ferguson was killed. The case has been tried by a competent trial judge and a fair jury, and a verdict rendered and a judgment entered in favor of the dependants of Mr. Ferguson. The usual appeal followed, and this court reached the conclusion that Ferguson was guilty of contributory negligence as a matter of law, disagreeing with the trial court and the jury that it was an issue of fact which should have

been and was determined against the Railway Company. In due time, a Motion for Rehearing was filed, and this court granted the motion and held that it was an issue of fact as to whether Ferguson was guilty of contributory negligence and that the judgment should stand. In due time, the appellant filed a motion for rehearing, and the court now has taken back the second opinion and writes the third opinion, saying that it adheres to the doctrines an- [fol. 362] nounced in the first opinion, namely, that Ferguson was guilty of contributory negligence as a matter of law, notwithstanding there is no evidence to sustain that finding, and notwithstanding that, as we believe, the reasoning by which it is endeavored to be supported on the application of known physical facts, is very faulty.

We insist that even if this court shall adhere to what appears to be an erroneous conclusion, namely, that Ferguson was sitting or squatting on the ends of the crossties, or was in a stooping position when struck, that it does not constitute contributory negligence as a matter of law, but on the contrary, raises an issue of fact for the jury. But if this court persists in holding Ferguson was guilty of contributory negligence, we most earnestly insist that if there was ever a case in which the doctrine of referring back only the matter in actual controversy, where the opinion of the Court of Civil Appeals only reverses the case on one issue should be applied, it seems to me that it should in this case.

General Remarks

We have not gone into the details as to how this accident might have occurred, because that matter has heretofore been fully treated by our Mr. Leonard Jones, now deceased, and we do not see that any effort of ours could improve upon what he has done in that respect. As heretofore stated, the writer, without knowledge of the fact that Mr. Leonard Jones had written a brief upon the lines indicated, was preparing to write one himself, and independently made a good many experiments and measurements for the purpose of illustrating his views to the court. This, as we [fol. 363] have said, was rendered unnecessary by his attention being called to Mr. Leonard Jones' brief, which the

writer had already confirmed in each of its statements before reading same. It is certain that if Ferguson was sitting or squatting beside the track, the pilot beam would have passed over his head, and it would have been impossible for it to have been covered with blood as the evidence shows it was covered. If Ferguson was standing, as contended by us, the pilot beam would have struck him at the exact point where his arm was broken and his body lacerated.

We earnestly request the court to take the brief of Mr. Leonard Jones, filed as a Petition for Rehearing of the first or original opinion, and make its own measurements under the evidence in the case and compare them with the statements in that brief.

The court having approved the finding of the jury that the Railway Company was guilty of negligence in failing to ring the bell, which was one of the proximate causes of Ferguson's death, it inevitably follows that the burden of proof was upon the Railway Company to establish that Ferguson was guilty of such contributory negligence as operated as a proximate, contributing cause to his injury. In other words, there is no presumption, no inference, to be drawn that Ferguson was guilty of contributory negligence, and even if he was guilty of contributory negligence, there is no presumption or inference that it operated as a proximate, contributing cause to his injury.

It does seem to the writer that it is far beyond the duty of this court to convict Ferguson of contributory negligence as a matter of law when there is really no evidence in the record *w*howing that he was guilty of contributory negli- [fol. 364] gence as a matter of fact, or strongly pointing to the fact that he was guilty of contributory negligence as a matter of fact.

The weakness of the opinion in this case, it seems to us, is clearly shown by the following process of reasoning:

First. The Railway Company was guilty of negligence in failing to ring the bell, and Ferguson had the right to rely upon the discharge of that duty imposed by custom.

Second. There is no evidence that Ferguson was on or about the track as the train approached.

Third. There is a strong inference—in fact, a presumption—that Ferguson was engrossed in his work or busy with something that detracted his attention from the approaching train, and that he relied upon the ringing of the bell, and inadvertently stepped into the path of danger and was injured.

Fourth. Even if Ferguson was sitting on the track, it does not follow that he was guilty of contributory negligence as a matter of law in failing to get out of danger before the train arrived, in view of the fact that he was in all reasonable probability, lulled into a sense of security by a failure to ring the bell.

Fifth. Stated differently, I assert this self-evident proposition that inasmuch as the Railway Company had lulled Ferguson into a sense of security in that it had formed the custom of ringing the bell as the train passed through the yard, it cannot now assert that he was guilty of contributory negligence as a matter of law in depending upon the Railway Company to carry out that self-imposed custom, which, if adopted, would have certainly prevented injury being inflicted upon Ferguson.

[fol. 365] Sixth. It follows as an inevitable conclusion that Ferguson was not sitting on the end of the ties or near the track, or that the engineer and fireman saw him and have deliberately lied about it. I know this is rather harsh language, but it is the only kind of language that is sufficiently forceful. I do not believe that anyone can persuade himself to reach the conclusion that an engineer and fireman on a passenger engine would travel for one-fourth of a mile or any other distance with the unusual situation of a lighted lantern sitting within a few feet of the track without keeping a close lookout for the man who had placed the lantern there and who must necessarily be expected to be in that vicinity. To say that they saw this lantern, as they claim they saw it, is to say that there was no man between the lantern and the rail or anywhere about the tracks, or that they lied when they said that they did not see him. It simply could not be otherwise.

The appellee represents that the Law Firm of King, Mahaffey & Wheeler, Postoffice address, Texarkana, Texas, represents the appellant.

The appellee respectfully presents this his Motion for a third rehearing of this case, and prays that after due consideration thereof, this court grant the said Motion for Rehearing and affirm the judgment of the District Court of Bowie County, Texas; or, that in the alternative, this court, if it adheres to the conclusion that deceased was guilty of contributory negligence, remand the said cause to the District Court of Bowie County, Texas, for the purpose of that court ascertaining and establishing the amount that the judgment should be reduced by reason of the contributory negligence of D. R. Ferguson.

Respectfully submitted.

Jones, Sexton & Jones, Keeney & Dalby, Attorneys for Appellee.

[fol. 366] [File endorsement omitted.]

In Court of Civil Appeals

[Title omitted]

Order Overruling Motion for Rehearing—October 7, 1926

This cause came on to be heard on the transcript of the record and appellee's motion for rehearing, and the Court having inspected said record and duly considered said motion is of the opinion that the said motion should be and the same is hereby overruled.

[fol. 367] In Court of Civil Appeals

[Title omitted]

Petition for Writ of Error—Filed November 6, 1926; in Supreme Court November 18, 1926

Foreword

The plaintiff in error confidently believes that a casual examination of the record will convince this court that

errors have been committed which should be corrected for the guidance of the court on another trial. But the plaintiff in error respectfully submits that this court in correcting those errors of law should refer the case back to the Court of Civil Appeals, for it is believed that that court, when it shall "learn" the law, will not remand the case, but end the litigation by affirming the judgment of the trial court. The justice of such procedure is apparent when considered in connection with the dissenting opinion of the Chief Justice.

[fol. 368] To the Supreme Court of Texas

This was a suit instituted in the District Court of Bowie County, Texas, by the Administrator of the Estate of D. R. Ferguson against the Kansas City Southern Railway Company for the recovery of Forty Thousand ($40,000.00) Dollars actual damages, claimed to have been sustained by the minor children of the said D. R. Ferguson, in that he met his death while employed by the Kansas City Southern Railway Company as car inspector at Leesville, Louisiana; and that the defendant in error being a common carrier by railroad of freight and passengers between the States, and Ferguson being employed by it in such commerce at the time of his death, the cause of action arose under the Federal Employers' Liability Law. Ferguson, while on duty, was struck by a passenger engine. It was claimed that the defendant in error was guilty of negligence, proximately resulting in the death of Ferguson, in four particulars:

(1) That it negligently failed to ring the bell.

(2) That it negligently failed to blow the whistle.

(3) That it operated the train at a negligent rate of speed.

(4) That it violated the Safety Appliance Laws and the applicable rules of the Interstate Commerce Commission in that it failed to dim the head light while passing through the yards at Leesville.

In response to special issues, the jury found in favor of the plaintiff in error on each of the said issues and that

same was a proximate cause of Ferguson's death. The damages were assessed at $13,000.00, and judgment entered accordingly, which was reversed and remanded by the Court of Civil Appeals, and a motion for rehearing was [fol. 369] granted, and the reversal set aside, and the judgment affirmed. A second motion for rehearing was granted to the defendant in error, and the judgment of the trial court was again reversed, a dissenting opinion being filed by Chief Justice Wilson. A third motion for rehearing was presented by the plaintiff in error, presenting each of the errors assigned in this petition, and same having been overruled, your petitioner applies for a writ of error.

Grounds of Jurisdiction

The case is one of which the jurisdiction of the Court of Civil Appeals is not final, the damages sought to be recovered exceeding One Thousand ($1000.00) Dollars in amount.

The Supreme Court has jurisdiction because the judges of the Court of Civil Appeals disagreed upon a question of law material to the decision of the case, in that the majority of the Court, after holding plaintiff in error was entitled to recover damages, further held that Ferguson was guilty of contributory negligence as a matter of law, and that therefore the verdict was excessive, and reversed and remanded the case on that point alone. The Chief Justice in a dissenting opinion held that it was a question of fact as to whether he was guilty of contributory negligence and that the jury having found such fact against contributory negligence, the judgment of the trial court should be affirmed. The injury to plaintiff in error is manifest.

This petitioner conceives and here avers, the Court of Civil Appeals in the majority opinion committed errors, and further erred in refusing to sustain your petitioner's first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth assignments of error, submitted in that court in plaintiff's in error last motion for rehearing. Said court made erroneous rulings upon questions of substan- [fol. 370] tive law involved in the case and material to your petitioner's rights in this suit, as follows:

(1) It held that the evidence was sufficient to show negligence on the part of the Railway Company in failing to ring the bell, which proximately caused the death of Ferguson, but erroneously held that Ferguson was guilty of contributory negligence as a matter of law.

(2) It held that the Railway Company violated the applicable rules of the Interstate Commerce Commission in failing to dim the head light, but erroneously held there was no evidence sufficient to raise the issue of same being a proximate cause of Ferguson's death.

(3) It held there was evidence sufficient to sustain the finding that the defendant negligently failed to blow the whistle, but erroneously held that there was no evidence tending to show it was a proximate cause of Ferguson's death.

(4) It held that there was evidence to sustain the finding of the jury that the train was operated at a dangerously high rate of speed, but erroneously held there was not sufficient evidence to raise the issue of it being a proximate cause of Ferguson's death.

The errors in the four particulars above set forth were all raised in petitioner's motion for rehearing in the ten assignments of error presented in said motion.

For convenience and that, as petitioner believes, this court may more readily grasp the importance of the questions, the plaintiff in error will present and discuss the assignments of error relied upon in his last motion for rehearing in groups.

[fol. 371] The first to fifth assignments of error, inclusive, being embodied in the proposition that:

There was not sufficient, if in fact there was any evidence, to justify the Court of Civil Appeals in finding that Ferguson was guilty of contributory negligence as a matter of law, and inasmuch as it was an issue of fact, if raised at all, error was committed to the prejudice of plaintiff in error.

In support of the foregoing proposition, the plaintiff in error submits the following four detailed assignments of error, each submitted as a proposition:

First Assignment of Error

The Court of Civil Appeals erred in holding that the finding of the jury that deceased, D. R. Ferguson, was not guilty of contributory negligence was not supported by the evidence, and erred in finding as a matter of fact that D. R. Ferguson was guilty of contributory negligence as a matter of law and of fact, in that he was not engaged in his work up to the moment of his death; and that at the time he was struck by the locomotive, that D. R. Ferguson was sitting or squatting near the ends of the ties on the east side of the main line. This finding is not only contradicted by circumstances, but it is contradicted by direct evidence, and is unsupported by any evidence whatever.

Second Assignment of Error

The Court of Civil Appeals erred in disregarding the fact conceded in the trial court, and insisted upon by both appellant and appellee on appeal:
[fol. 372] That Ferguson was in an erect position, and that the injury to his torso was caused by the pilot beam of the engine. That he in some manner came into a position where, while standing upright near the track, he was struck upon the torso, by the pilot beam of the engine which killed him.

Third Assignment of Error

The Court of Civil Appeals erred in infringing upon the right of the jury to decide disputed facts by disregarding the finding of fact by the jury upon disputed issues of fact; and in finding the facts to be otherwise than as found by the jury upon such disputed issues.

Fourth Assignment of Error

The Court of Civil Appeals erred in inferring that the engineer and fireman failed to observe the decedent Ferguson because such inference is necessarily based upon the further inference that Ferguson was sitting or squatting so near the track that a passing engine would strike him; and because the inference that the engineer and fireman failed to observe Ferguson sitting or squatting upon or

near the track is refuted by positive and direct testimony that they looked at the place where he was killed as they approached the place, and carefully observed the surroundings of such place and did not see Ferguson there.

Additional Proposition Under First-Fourth Assignments of Error

The parties to this suit having conceded, and tried the case upon the theory, that Ferguson was in an erect position when his torso was struck by the pilot beam, and there being evidence to support that theory of his injury, the Court of Civil Appeals has erred in disregarding the conceded facts and in holding that the finding of the jury to the effect that Ferguson was not guilty of contributory [fol. 373] negligence, was not supported by the evidence.

We believe that we will save the time of this court and simplify the questions by combining our argument with our statement.

Statement and Argument

These propositions and the four assignments of error are addressed to those parts of the four opinions and dissenting opinions of the Court of Civil Appeals dealing with the failure to ring the bell and Ferguson's conduct before and at the time of his injury, as relates to contributory negligence or absence thereof.

The proof showed that the defendant in error was a common carrier by railroad between the States, and that the deceased was employed by it in such commerce at the time he was killed.

The deceased was engaged in the work of inspecting a freight train which was being made up on a side track east of and parallel to the main line, there being a clearance of less than six feet between the tracks when cars were on each of them.

The testimony was sufficient to sustain the findings of the jury that an engine on the main line struck and killed Ferguson, who came into the path thereof from a point between cars without knowing of the approach of the engine. That it was customary to blow the whistle and ring the bell in passing over that part of the main line, and that the de-

fendant in error failed to do either. That the train was negligently run at a high rate of speed. It was proven and admitted that the defendant in error failed to comply with the Safety Appliance Laws and the applicable rules of the Interstate Commerce Commission in that it failed to dim the head light. These matters will be presented and discussed under the various propositions. Under the first [fol. 374] four assignments of error, we present the errors of the Court of Civil Appeals in disregarding the uncontroverted evidence and the facts as accepted by both the plaintiff in error and the defendant in error, and holding contrary thereto that Ferguson was sitting on or near the track and was struck by the step of the pilot.

The plaintiff in error consistently contended that Ferguson's torso was struck by the pilot beam. The defendant in error has solemnly agreed to this and declared that he was not sitting or squatting on or near the track, saying: (Page 3 its first motion for rehearing filed Feb. 26, 1926).

"There was no evidence introduced at the trial from which the jury, or the court, could reasonably find that deceased was sitting or squatting dangerously near the track at any time when the engineer and fireman, by keeping a diligent lookout, as they did, could have seen him."

And it further asserted in the first Motion for Rehearing (p. 4) that he was "struck by the pilot beam of the locomotive."

We cannot refrain from calling attention to the contradictory positions taken by the Court of Civil Appeals with reference to Ferguson's contributory negligence. These positions are copied in parallel columns from the opinions on first and last rehearings granted.

Opinion Filed March 18, 1926	Opinion Filed June 24, 1926
"If the engineer and fireman are to be believed, and no reason appears why they should not be, then the deceased for an appreciable period of time prior to his	"The record is far more in harmony with the inference that at the time the deceased was struck by the incoming train he was sitting or squatting dangerously near

injury was not knowingly standing and remaining in a position to be struck by the oncoming train, having time [fol. 375] to avoid being struck by it. Hence it is thought after all the substantive evidence had been considered, that the ultimate question of negligence vel non on the part of the deceased contributing to his injury remains in the domain of open fact for decision by the jury. There is proof rendering probable the existence of the fact, as was found by the jury; that the deceased did not carelessly or while intoxicated place himself in such position upon or near the main line track that he was struck and killed by an incoming passenger train."

the main line track, with his face towards the cars he had been inspecting, than that the deceased came out suddenly from between the cars on the passing-track and unexpectedly collided with the moving engine on the main line at some moment of its passing.

* * * * * * *

The more reasonable conclusion is that the operatives of the engine failed to observe the deceased."

"In harmony with the inference." "The more reasonable conclusion."

The pilot beam of the engine in question was described by the engineer as follows:

"I judge that pilot beam is something about three and a half feet above the tract, and the beam is about ten or twelve inches thick." (S. F. 85.)

The height of the main line rail is five and seven thirty-seconds inches (R. T. Hudson, S. F. 76), approximately six inches; thus, the bottom of the pilot beam would be four feet above the top of the cross ties.

The fireman of the locomotive which struck and killed D. R. Ferguson, testified:

"* * * I said I saw blood on the pilot beam, on the ribs of the pilot, or cow catcher and on the step on the

right side of the engine. The blood was all over the pilot beam, scattered different places and in spots, on the right hand end of it, that is the engineer's side of the engine, it was all over the end of it, scattered around in different places, on the front of it. I didn't notice whether there was any on the end of it or not, but I saw quite a bit of it on the front, a considerable bit of blood in several places, on the ribs of the pilot there was some blood, and on the steps on the right hand, below the end of the pilot there was quite a quantity of blood." (S. F. 44-45.)

[fol. 376] Realizing that the step could not have been more than sixteen inches above the top of the rail, and therefore not more than twenty-two inches above the top of the ties, and therefore not more than twenty-six inches above the top of the ground, anyone is driven to the inevitable conclusion that the train could not have inflicted the injury upon Ferguson by the pilot step first striking his torso, or by its striking his torso at any time and the same collision placing blood upon the pilot beam.

In view of the fact that we have a logical explanation disclosed by the testimony that points inevitably to the conclusion that the end of the pilot beam crushed the hole in his body, and that it has never been seriously contended by anyone until the Court of Civil Appeals advanced the thought that he was struck first by the step and the hole cut in his body and his head struck by the pilot beam, we are driven to the inevitable conclusion that he must have been struck by the pilot beam which inflicted the injury to his torso, and the further conclusion that his injuries could not have occurred in any other way.

The conclusion that Ferguson was sitting or squatting near the end of the ties is again positively contradicted by the testimony of the engineer, who said:

"In going through the yard, I was keeping a lookout. * * * I did not see Mr. Ferguson or any other man on or near the tracks in going through the yards that night. I did see a lantern in the yard there at Leesville. I saw a car repairer's lamp sitting on the ground between the tracks, between the main line track and track No. One, supposed to be the passing track, but I did not see Mr. Ferguson or any other man there about the lantern, no man

about this light whatever. * * * I can see the ground within a few feet of the end of the pilot." (S. F. 84.)

"As I went from Staples to Leesville, I did not see anybody between Staples and Leesville." (S. F. 89.)

[fol. 377] The fireman testified:

"I was keeping a watch ahead in going through Leesville that night, but I did not see any man on the tracks or near the tracks as we were passing through the yards. The headlight was giving a good light, so that I could see along the track, through the yard there. I saw a lantern as I went through the yard there, between the main line and the passing track." (S. F. 96.)

He further testified:

"I was about between a quarter and a half a mile from this inspector's light when I first saw it. The engineer could see it about as far as I could, one could see it as far as the other. I went right on by it and into the station and did not see anybody." (S. F. 97.)

The above quoted testimony (which was not contradicted) shows, it seems to us, that if Ferguson had been sitting or squatting on the ends of the ties or near the ends of the ties, that the engineer and fireman would most certainly have seen him. They were keeping a lookout, according to their testimony, and a very careful lookout, if they are to be believed and the jury had the right to believe this part of their evidence for they saw the lantern a distance of a quarter of a mile before they reached it.

There has never been any contention in this case that Ferguson would have been guilty of contributory negligence in getting on the main line track—in fact, there was positive testimony that it was usual and customary to get on said track in the performance of his duties. See testimony of the witness Nick Franklin (S. F. 72-73), where he says:

"As to the habit and practice of an inspector who inspected trains that were being made up at night in the yards of the Kansas City Southern Railway at Leesville, on and prior to February 12, 1923, with reference to moving away from the opening between cars after coupling

the air hose and inspecting the safety appliances, and the distance that they would move away from the car after having made said inspection, he would step back in the clear from the train that was being made up; I would say [fol. 378] that he would ordinarily move back several feet, maybe two, or three or four feet. A person making the inspection of a train that way, would move away from the standing cars about two, or three or four feet, step back in the clear several feet, that is, the practice and habit of the inspectors. With reference to the distance between the main line and the passing track where Ferguson was killed that inspectors were in the habit of moving from the cars, in stepping away from them, the main track and the switch track are right there close together, and when you stepped back from the switch after making an inspection, you would step back close to the main line."

In fact, the defendant in error so alleged the fact to be in its answer (bottom of p. 13, Transcript, Section 5, Appellant's Answer).

Authorities

Harvey vs. T. & P. Ry. Co., 166 Fed. 385; 92 C. C. A. 237.
Myers vs. Pittsburg Coal Co., 233 U. S. 184.
Railway Co. vs. Stout, 17 Wallace, 663.
T. & P. Ry. vs. Murphy, 46 Tex. 368.

Also see authorities page 25 of our printed brief in Court of Civil Appeals.

Fifth and Sixth Assignments of Error Submitted as Propositions

Fifth Assignment of Error

"The Court of Civil Appeals erroneously found that there was not sufficient evidence to support the jury verdict that Ferguson was blinded by the light which proximately contributed to his injury; or, in other words, in finding that the confessed violation of the safety appliance regulations in regard to the light was a proximate, contributing cause of Ferguson's injury and death.

"This was error because there was sufficient evidence to justify the jury in finding that Ferguson was in a position on or near the track, and, being blinded by the light, attempted to get away from the danger, and was confused to such an extent that in turning from the light, he failed to get away from the danger; also, that Ferguson came from between the cars and was blinded by the light, and in his confusion, turned from the light and brought his body in a position to be struck by the pilot beam."

[fol. 379] Sixth Assignment of Error

"The Court of Civil Appeals erred in holding the presumption that deceased exercised due care is only applicable to cases where the evidence shows he was exercising such care up to the time of injury".

We contend the evidence raised the issue of Ferguson being blinded and misled by the headlight—if he was there—could be no contributory negligence. (Safety Appliance Law).

J. F. Anderson, Superintendent of Terminals for the Chicago, Milwaukee, and St. Paul Railway Company, introduced as an expert by appellant, testified on cross examination:

"It is a fact that a man in front of one of those bright lights can't look at it, and if he does, it will blind him and confuse him if he looks at it." (S. F. 155)

A. Nelson testified that he had been railroading for ten years as a trainman, that he worked for the Kansas City Southern Railroad for two years, from 1921 to 1923; that

"I have worked on the roads in the night time, and in those yards, and a road engine has got a brighter light than a yard engine, and has more candle power; those headlights are parts of the equipment controlled by the safety appliance law. To take a road engine with the regulation headlight, such as they use there, and run it through a yard, a person standing or getting in front of that engine and looking toward the headlight as it approached, when the engine got in two hundred or two hundred and fifty feet of them, if it was burning full bright it blinds them, he

just can't see, he couldn't see very far ahead of him, and I don't think a man could tell the distance a train was from him with that kind of headlight shining bright, but he could come nearer telling the distance the train was from him if the light is dimmed. Generally speaking, the road engines have a means of diminishing the lights on the road, dimmers, and the dimmers are to reduce the candle power, and they are used from right in the cab, after they get in the clear of the main line, in meeting other trains, they put them out, and I have worked with them where they would dim them going through yards [fol. 380] and towns. As to whether the headlight on an engine shines right straight out ahead of it or fans out, it fans out, and any person crossing the track or coming in line with that headlight it would have the effect of blinding him, like a man right straight in front of it. Some of the engines used those lights—the dimmers, in going through the yards there at Leesville, and some didn't—there were quite a few trains made up in the yards there, and during the eight hours Mr. Ferguson would be working there would be about three or four trains made up, I imagine, on an average." (See S. F. page- 20 and 21).

Other witnesses testified to the same effect. (S. F. 72-73)

Authorities

Myers vs. Pittsburg Coal Co., 233 U. S. 184; and cases cited in our printed brief in The Court of Civil Appeals on page 25.

Seventh and Eighth Assignments of Error Submitted as Propositions

Seventh Assignment of Error

"The Court of Civil Appeals erred in finding, as a matter of fact, that the evidence was not sufficient to sustain the finding of the jury that the failure to blow the whistle was an efficient cause of D. R. Ferguson's death."

Eighth Assignment of Error

"The Court of Civil Appeals erred in concluding that the evidence does not warrant the finding made by the jury

that the speed of the train at the time and under the circumstances was a proximate cause of D. R. Ferguson's death".

Statement

See Statement and Authorities under our grouped assignments one to four—and five and six.

Ninth Assignment of Error Submitted as a Proposition

"The Court of Civil Appeals has erred in reversing and remanding the entire cause for a new trial, in that, under the findings of the Court of Civil Appeals, the error "affects part only of the matter in controversy and the issues are severable", and the cause should only be reversed and [fol. 381] remanded on the question of damages assessed, for the purpose of permitting the trial court to try and determine the amount that should be deducted on account of the contributory negligence of the deceased."

Statement

See Statement and Authorities under first to fourth assignments.

Argument

When "there is proof rendering probable the existence of the fact", whose duty, as between court and the jury, is it to "harmonize" and deduce the "reasonable conclusion" from such proof? In this case, the jury did both harmonize the evidence and deduce facts reasonably concluded therefrom. And of their action, the court has said:

"It is not difficult to conceive that the deceased must have stepped in the path of the engine at some moment of its passing", and again—"The inference is allowable that the deceased must necessarily have stepped quickly in the way of the engine from some cause, coming from somewhere near the engine."

The Court of Civil Appeals holds:

"* * * It is equally as clear, as indicated by the injuries on his (Ferguson's) body and the blood spots on the steps of the pilot, that the deceased was sitting on or squatting near the outer ends of the ties from the east

rail of the main line track, and that he was not standing on his feet erect".

The engineer and the fireman both testified unqualifiedly that they were keeping a sharp lookout until the engine passed the lantern, and did not see any object on the track, or between the tracks (S. F. 84, 89, 96-97, this motion p. 17). This evidence was uncontradicated. If Ferguson had been on or near the track, they must have seen him. It is conclusive that he must have stepped from between two cars or from the end of the string of cars after the engine had gotten so close to the place where he was struck that the front end thereof hid him from view of the engineer and [fol. 382] fireman.

The testimony of Dr. F. P. Jones (S. F. 80-81) showed that Ferguson's body showed a large hole in his side right at the arm-pit, that his right arm was broken about two-thirds of the way towards the shoulder joint, and that his skull was fractured. There was blood upon the pilot beam and upon the ribs and steps of the pilot.

The court then finds from this set of circumstances, i. e., the point at which Ferguson's body was struck and the portions of the locomotive upon which blood was found, that Ferguson must have been sitting or squatting when he was struck. Ferguson was five feet eight and one-half inches or five feet nine inches tall (S. F. 81).

The pilot beam of the engine in question was described by the engineer as follows:

"I judge that pilot beam is something about three and a half feet above the track, and the beam is about ten or twelve inches thick." (S. F. 85.)

The height of the main line rail is five and seven thirty-seconds inches; thus, the bottom of the pilot beam would be four feet above the top of the cross ties. The fireman of the locomotive which struck and killed D. R. Ferguson, testified:

"* * * I said I saw blood on the pilot beam, on the ribs of the pilot or cow catcher and on the step on the right side of the engine. The blood was all over the pilot beam, scattered different places and in spots, on the right hand end of it, that is the engineer's side of the engine, it was all

over the end of it, scattered around in different places, on the front of it, I didn't notice whether there was any on the end of it or not, but I saw quite a bit of it on the front, a considerable bit of blood in several places, on the ribs of the pilot there was some blood, and on the steps, on the right hand, below the end of the pilot there was quite a quantity of blood." (S. F. 44-45.)

The logical conclusion to be drawn from this testimony, it seems to us, is this: That the pilot beam of the engine struck Ferguson, since it is the highest part of the engine [fol. 383] upon which blood stains were found; that the blood found upon the ribs of the pilot and the step of the pilot ran down from the injured body of deceased to the pilot and pilot step, since blood, like water, runs down-hill when freed. This is emphasized by the solemn statement made by the defendant in error in its motion for rehearing filed Feby. 26, 1926, in which it says that while the deceased was in an erect position the pilot beam struck him. The parties had the right to treat this as a concluded fact—Certainly so where the fireman and engineer both so testified, (that he was not sitting on or near the track). They saw the witnesses and were certainly in a better position to appraise the weight of their evidence than the Court of Civil Appeals.

We dislike to stray from the record, but as the court has concluded that Ferguson was struck by the step on the pilot, we feel that we are justified in pointing out that the pilot sill-step is bolted to the bottom of the pilot beam and is never more than sixteen inches above the rail. (Safety Appliance Standards for Locomotives, Order of Interstate Commerce Commission, March 13, 1911).

Realizing that the step could not have been more than sixteen inches above the top of the rail, and therefore not more than twenty-two inches above the top of the ties, and therefore not more than twenty-six inches above the top of the ground, anyone is driven to the inevitable conclusion that the train could not have inflicted the injury upon Ferguson by the pilot step first striking his torso, or by its striking his torso at any time and the same collision placing blood upon the pilot beam. Figure it as you will, if the step cut the wound in his torso, no part of his body could possibly have been struck by the pilot beam, for the top of

[fol. 384] his head could not have been more than sixteen inches above the step, and there was a clearance between the step and the bottom of the pilot beam of twenty-six inches; or in other words, if the step cut the hole in his torso, the pilot beam would have passed ten inches above the top of his head. This is clearly demonstrable by the following calculation: There was a clearance of three and one-half feet or forty-two inches between the bottom of the pilot beam and the top of the rail. The extreme height of the step as permitted by the safety appliance regulations is sixteen inches, leaving a clearance between the pilot beam step and the bottom of the pilot beam of twenty-six inches; and if we assume that Ferguson was a man of ordinary build, there could not have been an extension of his body from the wound in his torso to the top of his head of more than sixteen inches. You cannot imagine a man five feet eight inches tall of such build as that there would have been an extension of his body amounting to some thirty inches above his armpit. No part of his body could have possibly come in contact with the pilot beam and no blood could have been placed on the pilot beam by a collision in which the step cut the hole in his torso.

It thus appears that the conclusion of the Court of Civil Appeals that Ferguson was sitting down or squatting when he was killed is directly contradicted by the testimony of the engineer and the fireman of the train which struck Ferguson. As the bottom of the pilot beam was three and one-half feet from the rail, and as the pilot beam was ten or twelve inches thick, and as the rail is approximately six inches high, it is clear that the pilot beam would have completely passed over the man if he had been sitting or [fol. 385] squatting near the ends of the ties. For a man who is five feet nine inches tall, to give him his full height, would not have a body or torso of such length as to extend upward a distance of four and one-half feet, which would be necessary for the center of the pilot beam to strike the top of his head. It seems to us that the evidence points clearly to this: That, as the pilot beam is four feet ten inches or five feet from the ground, i. e., the top of the pilot beam, it was at just about the right height to inflict the injury upon Ferguson's torso when he was standing; as the bottom of the pilot beam was three and one-half feet

above the rail, and as the rail is approximately six inches high, it is obvious that a man whose height is five feet nine inches could sit on the end of a tie and escape injury from the pilot beam. The blood on the pilot beam cannot be accounted for in any way other than that he was standing and the beam struck his body.

We believe that we can point out with such clearness that the court has erred in holding that Ferguson was squatting or sitting on the track, and that he was struck by the step of the engine, and was guilty of contributory negligence as a matter of law, as to demonstrate such error of the court in so holding.

The writer knows no better way than a crude but apt illustration. The writer is five feet eight and a fourth inches tall. Sitting erect, the top of his head is just thirty-one inches above the object upon which he sits. Allowing a little for natural slump while sitting in an erect position, it is safe to say that the extreme height—the top of an average man's head of such height while sitting—is thirty [fol. 386] inches above the object on which he sits. Realizing that there is a clearance of three and one-half feet or of forty-two inches between the bottom of the pilot beam and the top of the rail, and that deceased could not have sat on the rail without being ground into mince-meat, and that the rail is approximately six inches high, we have a clearance of forty-eight inches between the bottom of the pilot beam and the top of the tie.

It required no imagination whatever to conclude—in fact, the testimony conclusively shows—that the pilot beam would have passed eighteen inches above the top of this man's head had he been sitting on the end of the ties. Therefore, it is absolutely certain that he was not sitting on the end of the ties.

Again, the court argues that the blood on the end of the pilot beam was caused by the pilot beam striking the back of Ferguson's head and crushing his skull. There is no warrant for this conclusion, for there is not a particle of evidence in the record, and I believe that the record in fact negatives the theory that there was any break in the skin of the head or anything that would have permitted his blood to have flown therefrom, except the small cut on his face evidently caused by his body being rolled or dragged

after it had been knocked forward and struck again by the train or dragged with the movement of the train. Certainly, this court cannot piece out the defense of contributory negligence by assuming in the absence of evidence that there was a cut or break of the skull on his head from which blood escaped, as the burden was upon the defendant in error to show such contributory negligence.

[fol. 387] Following the process of elimination and of calculation, we find that the arm-pit of a man standing erect, i. e., a man five feet eight inches tall, would be between forty-six and fifty-two inches above the ground. Then, follow up our calculation, and what do we have? Allow six inches for the width of a tie, six inches for the height of a rail, three and one-half feet clearance between the bottom of the pilot beam and the top of the rail, and we have a clearance of four feet and six inches between the bottom of the pilot beam and the ground at the end of the ties—just the proper height for the end of the pilot beam to have inflicted the injury to Ferguson's torso (knocked a hole in his body) and account for the blood on the pilot beam. These—if no other—ways in which the blood got on the pilot beam can be accounted for. This also accounts for the blood spattering downward and being found on the ribs of the pilot, and on the steps of the pilot beam. The crushing of the skull is easily accounted for by the body being thrown against the end of a cross-tie or the ground with such force as to crush his skull.

In view of the fact that we have a logical explanation disclosed by the testimony that points inevitably to the conclusion that the end of the pilot beam crushed the hole in his body, and that it has never been seriously contended by anyone until the Court of Civil Appeals advanced the thought that he was struck first by the step and the hole cut in his body and his head struck by the pilot beam, we are driven to the inevitable conclusion that he must have been struck by the pilot beam which inflicted the injury to his torso, and the further conclusion that his injuries could not have occurred in any other way.

[fol. 388] The conclusion that Ferguson was sitting or squatting near the end of the ties is again positively contradicted by the testimony of the engineer, who said:

"In going through that yard, I was keeping a lookout. * * * I did not see Mr. Ferguson or any other man on or near the tracks in going through the yards that night. I did see a lantern in the yard there at Leesville. I saw a car repairer's lamp sitting on the ground between the tracks, between the main line track and track No. One, supposed to be the passing track, but I did not see Mr. Ferguson or any other man there about the lantern, no man about this light whatever.

"* * * I can see the ground within a few feet of the end of the pilot." (S. F. 84.)

"As I went from Staples to Leesville, I did not see anybody between Staples and Leesville." (S. F. 89.)

The fireman testified:

"I was keeping a watch ahead in going through Leesville that night, but I did not see any man on the tracks or near the tracks as we were passing through the yards. The headlight was giving a good light, so that I could see along the track through the yard there. I saw a lantern as I went through the yard there, between the main line and the passing track." (S. F. 96.)

He testified further:

"I was about between a quarter and a half a mile from this inspector's light when I first saw it. The engineer could see it about as far as I could, one could see it as far as the other. I went right on by it and into the station and I did not see anybody." (S. F. 97.)

The above quoted testimony (which was not contradicted) shows, it seems to us, that if Ferguson had been sitting or squatting on the ends of the ties or near the ends of the ties, that the engineer and fireman would most certainly have seen him. They were keeping a lookout, according to their testimony, and a very careful lookout, if they are to be believed, and the jury had the right to believe this part of their evidence, for they saw the lantern a distance of a quarter of a mile before they reached it. Certainly, if they saw the lantern for that distance, if a man had been sitting or squatting on the ties or near the ties, they must have seen him, as a dark object if more readily seen in [fol. 389] bright light than is another and weaker light.

The evidence was so conclusive that Ferguson was not in a position to be seen as the train approached that neither plaintiff nor defendant requested a finding as to whether the engineer or fireman should have seen him.

We respectfully submit that in view of the above undisputed testimony and the circumstances of Ferguson's death as shown from the injuries found on his body and the blood on the pilot beam of the locomotive, that the Court was in error in holding that he was struck while sitting or squatting near the outer ends of the ties from the east line of the main line track, and that he was not standing on his feet erect.

We respectfully ask this court to stop and summarize:

The uncontroverted evidence shows that Ferguson was not sitting or squatting on the track until the engine got so close that it interfered with the view of the engineer and the fireman. The same evidence shows he was not between the tracks until they got very near the place where he was struck. The physical facts show that the injury to his body could not have been inflicted by the pilot step and his blood stain the pilot beam, for such beam would have passed more than ten inches over his head. The height of the man, the location of the blow and the relative height of the pilot beam and other physical facts, such as it being slightly down-grade from the main line toward the side track, show that the wound on his body could have been caused only by the pilot beam striking him while in an erect position between the tracks.

These facts also authorized, if indeed they did not require, the jury to find that Ferguson was between two cars and stepped therefrom and, by reason of the bell not ringing or by reason of being blinded by the light, more likely [fol. 390] by both, he was deceived as to his position and the danger that threatened him; and, turning his face away from the bright light in an effort to get his bearings and discover his locality and avoid danger, he got in the path of the pilot beam and was struck and the injuries which caused his death inflicted upon him.

There has never been any contention in this case that Ferguson would have been guilty of contributory negligence in getting on the main line track—in fact, there was positive testimony that it was usual and customary to get

on said track in the performance of his duties. See testimony of the witness Nick Franklin (S. F. 72-73), where he says:

"As to the habit and practice of an inspector who inspected trains that were being made up at night in the yards of the Kansas City Southern Railway at Leesville, on or prior to February 12, 1923, with reference to moving away from the opening between cars after coupling the air hose and inspecting the safety appliances, and the distance that they would move away from the car after having made said inspection, he would step back in the clear from the train that was being made up; I would say that he would ordinarily move back several feet, maybe two, or three, or four feet. A person making the inspection of a train that way, would move away from the standing cars about two, or three or four feet, step back in the clear several feet, that is, the practice and habit of the inspectors. With reference to the distance between the main line and the passing track where Ferguson was killed that inspectors were in the habit of moving from the cars, in stepping away from them, the main track and the switch track are right there close together, and when you stepped back from the switch after making an inspection, you would step back close to the main line."

In fact the defendant in error so alleged the facts to be in its answer (bottom of p. 13, Transcript, Section 5, Appellant's Answer).

Suppose it be conceded (which we do not and can not concede, for it is contrary to the undisputed evidence and contradicted by the physical facts) that, as found by the [fol. 391] Court, Ferguson was sitting on the end of a crosstie waiting for more cars; and that, owing to the failure to ring the bell, Ferguson was not apprised of the near approach of the train (and we may add, by reason of the glaring headlight and the extra speed of the train) until he was struck, or that he endeavored to get away from the track and by reason of being thus misled, he was struck and killed; it does not follow as a conclusion of law that such conduct constituted contributory negligence. To concede everything possible in favor of the defendant in error, there is nothing in the record to show nor is there any rea-

son that can be advanced to argue that Ferguson would have been guilty of any wrong in temporarily resting on the end of a tie; for, as announced in the case of Harvey vs. Texas & Pacific Ry. Co., 166 Fed. 385; 92 C. C. A. 237, he was in the master's service, present to perform his duty, although at the given moment he was not engaged in the actual performance of any work: "They also serve who only stand and wait."

The dissenting opinion of Chief Justice Wilson on the last rehearing aptly states the correct rule:

"As I understand the case, the jury had a right to find from the testimony that the trainmen violated an established practice when they failed to ring the bell of the locomotive as the train approached the place where the accident occurred. So finding, I think the jury might properly have found, further, that the deceased had a right to rely and did rely upon an observance of the practice on the occasion of the accident; and, having found that, to find, as they did, that deceased was not guilty of contributory negligence as charged against him. I think the proper disposition of the appeal was made when the judgment of the court below was affirmed, and respectfully dissent from the conclusion reached by the majority of the members of this court that said judgment should be reversed."

We also call to the attention of this court the fact that no presumption or inference should be indulged in against the deceased, for regardless of the somewhat careless expression contained in the opinion of the Court of Civil [fol. 392] Appeals in this case, the law is definitely settled that in death cases, by reason of the circumstance of the death alone and the inability of the deceased to give his version of how the accident occurred, a presumption is raised that he was not guilty of negligence, that is to say, that he was exercising proper care for his own safety at the time he was injured. In this connection I call attention to the case of Myers vs. Pittsburg Coal Company, 233 U. S., p. 184, and from which opinion I quote on pages 192 and 194 as an emphasis of the sufficiency of the evidence in this case to acquit Ferguson of contributory negligence—to at least place that question in the hands of the jury.

"The opinion of the circuit court of appeals placed the reversal largely upon the want of definite proof as to the manner in which Myers came to his death,—whether by contact with the wire, or, if so, whether that merely disabled him or he was only injured or stunned by the fall, was seized with vertigo or other sudden sickness and fell from the car for that reason, or lost his footing by some unexpected movement of the train, or voluntarily got off the car and stumbled and fell upon the track, or became bewildered in the dark, and mistakenly supposed himself to be in a place of safety. The court held that all these situations were more or less probable, and, in the absence of some more accurate means of ascertaining the true condition in this regard, no recovery could be had for the wrongful causing of his death, and that an examination of the testimony brought the court to the conclusion that the jury should not have been permitted to guess as to the proximate cause of death. This question, however, was submitted to the jury and found against the defendant in the trial court. Unless the testimony was such that no recovery can be had upon the facts shown in any view which can be properly taken of them, the verdict and judgment of the district court must be affirmed.

"That there was ample testimony to carry the question of negligence to the jury we have already said, and in any [fol. 393] case it cannot be said as a matter of law that there was no evidence tending to show that Myers came to his death by the negligence of defendant in one or more of the ways charged in the petition. *Considering the testimony, as it must be considered in determining questions of this character in appellate courts, in its most favorable aspect to the plaintiff below*, we think the jury might well have found, in view of the place at which the body of Myers was found near to the wire, with his cap gone from his head, that he came in contact with that wire and was thrown to the ground, and that he survived from contact with the wire, carrying the voltage which it did, and while in this situation was run over and killed by the approaching motor car, the operator being unable to see his body upon the track because of the want of efficient light in the entry or in the motor car. *We think reasonable men, considering the testimony adduced, might well have come to*

this conclusion, and that it was error in the appellate court to set aside the verdict for entire absence of testimony upon this subject. In our opinion, the trial court properly left the question to the jury upon testimony which, when fairly considered, might sustain the verdict. See Humes v. United States, 170 U. S. 210, 42 L. Ed. 1011, 18 Sup. Ct. Rep. 602." (Italics ours.)

The Myers case but emphasizes the doctrine announced by the Supreme Court of the United States in Railway Co. vs. Stout, 17 Wallace 663, and by Chief Justice Roberts in T. & P. Ry. vs. Murphy, 46 T. 368. It is confidently believed the doctrine announced in these cases most thoroughly demonstrates the error of the Court of Civil Appeals in arrogating to itself the right to hold Ferguson was guilty of contributory negligence as a matter of law.

The fifth and sixth assignments of error are grouped and discussed together.

Fifth Assignment of Error

"The Court of Civil Appeals erroneously found that there was not sufficient evidence to support the jury verdict that Ferguson was blinded by the light which proximately contributed to his injury; or, in other words, in [fol. 394] finding that the confessed violation of the safety appliance regulations in regard to the light was a proximate, contributing cause of Ferguson's injury and death.

"This was error because there was sufficient evidence to justify the jury in finding that Ferguson was in a position on or near the track and, being blinded by the light, attempted to get away from the danger, and was confused to such an extent that in turning from the light, he failed to get away from the danger; also, that Ferguson came from between the cars and was blinded by the light, and in his confusion, turned from the light and brought his body in a position to be struck by the pilot beam."

Sixth Assignment of Error

"The Court of Civil Appeals erred in holding the presumption that deceased exercised due care is only applicable to cases where the evidence shows he was exercising such care up to the time of injury."

We ask the Court to carefully consider our presentation of these propositions, for we necessarily further discuss the error committed by the Court of Civil Appeals in holding that the injury to Ferguson's torso was caused by being struck by the step.

If the failure to dim the headlight was a proximate cause of the injury, there could be no contributory negligence.

The Court of Civil Appeals holds:

"It is plain that the deceased was facing east or northeast. The train was coming from the south. Under such circumstances, it would be an unwarranted assumption that the deceased was blinded by the headlight and so confused as to his whereabouts as to step in the direction of the train without knowing it, or that the speed of the train of itself and by itself, wholly or partially caused the injury."

We think that this finding of the court is not supported by the evidence. It is true that the circumstances indicate that Ferguson was facing east or northeast when struck, [fol. 395] but there is utterly nothing to show in which direction Ferguson was facing just the instant before he was struck. It seems to us that the only logical conclusion which can be reached is that Ferguson was blinded by the intensely brilliant headlight as he stepped from between the cars, and that either he suddenly realized his dangerous position and faced away from the train as he was struck, or that he had faced away from it in an effort to regain his bearings.

The writer does not know whether or not members of this court have ever driven at night over Texas roads prior to the time that the headlight dimming law went into effect. However, the writer has doen so, and he makes the unqualified statement that driving at night and approaching a glaring headlight, he is utterly unable to estimate whether that light is one-half mile away, one-quarter mile away, or one hundred yards away. That the writer's experience with glaring headlights is not at all unusual is best evidenced by the fact that the Legislature of every State in the Union has endeavored, by legislat*ure*, to eliminate the glaring headlights of automobiles on roadways and penalize the users of same. One living in the country going back and forth over the road prior to the passage of the law re-

quiring the elimination of glaring headlights, would rarely pass over the road in the morning without finding from one to three automobiles ditched, each accident being due to glaring headlights. Each morning, the road was strewn with dead dogs, cats, rabbits and other animals blinded by the lights from automobiles and so confused that they could not escape. The evidence in this case is that the headlight on the engine which killed Ferguson was brilliant at a dis-[fol. 396] tance of 1,500 feet ahead of the engine. That is a quarter of a mile or more. In view of the legislation against glaring headlights on automobiles, the court should take judicial knowledge of the fact that a person is utterly unable to locate a glaring light which will illuminate the road ahead of him for 1,500 feet. Such is the evidence in this case—the uncontroverted evidence (Statement of Facts p. 21). That being true, the speed of the train becomes the most important factor in the accident which resulted in the death of Ferguson. If Ferguson believed the light which he saw, if he did see it, to be 1,500 feet distant and believed, from his knowledge of the train, that it was running at a rate of speed just one-half of that at which it was running, then Ferguson had twice as much time to remove himself from a point of danger than if the train was running at double the usual speed. He was utterly unable to tell whether the train was 500 feet or 1,500 feet away from him. If it was 500 feet away from him, he only had about one-third of the time to remove himself out of danger that he would have had, had the train been 1,500 feet away from him.

We believe that a careful consideration of the testimony relative to Ferguson's activities just preceding his death will convince this court that the Court of Civil Appeals was in error in holding that Ferguson was guilty of contributory negligence under the circumstances. Certainly, we believe that the Court will not say, in view of the facts in this case, that Ferguson was guilty of contributory negli-[fol. 397] gence as a matter of law.

The Court of Civil Appeals holds:

"He (Ferguson) was next seen at six-forty-five o'clock p. m. At that moment, he was standing at the north end of a train of freight cars then assembled on the passing

track, with his hand on the north end of the last car in the string, and was looking north, which was the direction the freight crew were weighing cars. At the time, his lantern was sitting on the ground near the end of this box car. No. one saw deceased alive after that time."

We respectfully call the Court's attention to the fact that the Court of Civil Appeals is in error here. A. H. Thorla testified:

"When I go from my home to my daughter's, I travel north, up the street to Mr. Dawkins' residence, and then across the railroad yards, northwest. Where I went across the yards carried me something like three blocks down south of the depot at Leesville where I strike the railroad." (S. F. 65)

His daughter lives due west of the depot, in the middle of the second block from the depot. He testified that he crossed the track going west; that he saw some cars on the track next to the main line track; that they extended back south of where he was; that he passed the north end of that string of cars.

"As to how close to the north car I passed it was thirty or forty feet; * * * When I passed that car that I spoke of I saw Mr. Ferguson walking around there. With reference to that car, he was next to the track, like he was coming right along the track, right at the main line, about that first line of cars; he was facing north coming towards me, but I was traveling pretty fast, and I went on; Mr. Ferguson was right about the end of those cars when I saw him; he had a lantern in his hand. After I saw him there I went to my daughter's; I went right straight to my daughter's; in going to my daughter's, I went up by the depot and turned off and went up to her house, I turned to the left and went on to her house. In going from the depot to her house I went a block and a half. Between the time that I last saw Mr. Ferguson and the time I got to my [fol. 398] daughter's house I never did stop; when the passenger train came in from Lake Charles that night I had just got on the porch at the house; when I got on the porch I didn't see the train, I heard it coming in; that is the length of time that passed". (S. F. 65-66)

It appears from the above testimony that Thorla was the last person who saw Ferguson alive, and that he saw him about the cars where he was supposed to be working just before the passenger train which struck and killed him came into the yards, as Thorla, who says that he was going "pretty fast", barely had time to walk four blocks and a half between the time he passed Ferguson and the time the train came into the yard.

The Court of Civil Appeals holds that Ferguson was last seen alive twenty minutes before the passenger train arrived. It further holds:

"As seems evident, during these twenty minutes he was not performing any duty there, although expecting more cars to be ultimately brought there to go into the train being made up. He was not engaged in inspecting the cars and in coupling them, as that work had been done as to the string of cars assembled. He was waiting for more cars to be brought there. The freight crew were still weighing cars at the scale".

The Court of Civil Appeals has unintentionally and erroneously assumed that it affirmatively appears in the testimony that the fifteen cars which were standing on the track after Ferguson's body was discovered, were standing there for a long time prior to the time the passenger train came in. This is not supported by the evidence, as we shall now point out. J. C. Miller, who was the fireman of the engine which was making up the freight train which Ferguson was inspecting, testified:

"As to what my engine was doing at the time the passenger train came in, we had been weighing cars, but I don't know for sure whether we *just* pulled out of the scale tracks or whether we were standing still at the time, I don't know for sure whether I had finished my work or not. * * * As I would weigh a car I would send them on down to to track No. One, or the track next to the main line, as you would weigh a car you would cut it off of the scales [fol. 399] and get another one, and shove it on down that way". (S. F. 128-129) (Italic ours)

Nick Franklin, the car inspector who followed Ferguson, testified:

"Q. Now, in making up a train in the yard as the train was being made up on this track that night, what was the customary way in which the inspector would perform his work? We will say, for instance, that the caboose and three or four cars were set in on the south, as the train was going north, on the south end of the track to which you were going to build the train—now, where would the inspector be with reference to those first cars, would he get to them?

"A. Yes sir, he would go to the first cars put in there and couple them up and inspect them, and as car after car came in, after they later set in two more cars and coupled on the three already there, for instance, the inspector would couple up the air on them and inspect them as he would put them in there. Generally he would go on one side and inspect them as they were going in there, and as they finished up the train he would go down the other side, but there was no fixed rule that would keep him from going over and looking at the other side while he was waiting for other cars; he did it in the most expeditious way, owing to the speed the cars were being put in. The inspector would make light repairs, if he found light defects, he would repair them, and then in the process of his work he would keep on building the train up at I have described until it was finished. In inspecting the cars or coupling up the air where cars are put in, like these books, say toward you is a bunch of cars already connected up, and the air coupled up, and one or two or more come in and are coupled into this string of cars, ordinarily he would start to doing his work at this first one, he would start at the hind end of them and keep coming on up as they coupled on. As two or three more cars came in and were coupled up he would couple the air hose at this place. He would have to go in between to couple the hose; he would not necessarily have to go in there to inspect the knuckles and appliances to see if everything was all right, only to couple the air, and after coupling the air he would go to the next place and perform the same work and make the same inspection and keep that up until he would get to the end of those cars, and then he would stand around there and wait for more cars, his place would be at or about that end of the train" (S. F. 34-35).

T. H. Burke, the conductor of the freight train which was being made up at the time Ferguson was killed, testified:

[fol. 400] "The scale track is not a part of the main line track, it is just called the scale track and it comes out right above the depot and runs down parallel with the main line, and comes into No. One track—all the same as No. One track, only the north end is called the scale track. As we weighed these cars we would push them off, shove them back, one at the time, and we had about eighteen cars hooked onto the engine. We weighed the last one away from the engine first, and then as we weighed it we turned it loose and shoved another one on at the same time" (S. F. 133).

It appears from the above quoted testimony, that the method or manner of making up this train was to place the caboose on the south end of the track and then as the cars were weighed to shove them on down to connect with the caboose, one at a time or two at a time as they got them weighed. All of the members of the crew which was engaged in making up the freight train, testified that they were weighing cars and shoving them off up until the time the passenger train came in and after it came in. Therefore, we think that the conclusion of the Court of Civil Appeals that the fifteen cars which were found to be properly inspected after Ferguson's death were all placed in the track before, and some time before, the passenger train came in is erroneous and clearly not supported by the evidence; but if they had been there several minutes, it does not follow as a conclusion of fact that Ferguson did not leave the end of the string and go back to the caboose, or go between two cars of that cut in the regular discharge of his duties, such as replacing an air hose or making light repairs, and while coming from between the cars, he received his injury.

While it may be impossible to say definitely just what his mission was at the time Mr. Thorla saw him walking alongside those cars, it is not unreasonable to conclude that ad-[fol. 401] ditional cars had been switched in onto this train that was being made up after the Barnhill and other boys left Ferguson; and that he had found some little defect

in the air hose connection at some point between those cars, or between the cars that had already been placed on the track when the Barnhill boy and others saw him; and that he had gone to some place to secure the necessary supplies for making repairs, possibly securing a piece of hose to supply the connection, and when Mr. Thorla saw him, he was traveling to a place where he would use the same in making the necessary repairs; and that he, in fact, passed between two cars and made the repairs; and that he stepped backward from such place, and in doing so, being blinded by the headlight or not being warned of the near approach of the train by the bell ringing, or by reason of both conditions, he made a mistake and stepped in the path of the oncoming train. In such case, it cannot be said that the headlight did not confuse him; nor can it be said that the failure to ring the bell was not the proximate cause of the injury; nor can it be said that he was guilty of contributory negligence as a matter of law under the existing circumstances.

It must be borne in mind, as clearly appears from an examination of the rules and regulations of the Interstate Commerce Commission, that the portions of cars covered by the safety appliance legislation, are of such nature that repairs thereto may be easily and readily made. For instance, the air line on the cars consists of iron pipes, and at the end of cars, with hose connections thereto, which are [fol. 401a] easily detachable and can be readily replaced by one man in a few seconds. The knuckle of the coupler and the pin are small parts easily removed and replaced with new ones. It was the duty of Ferguson to make such repairs; and inasmuch as the jury had the right to believe the testimony of the fireman and engineer with reference to keeping a lookout, and inasmuch as this Court cannot assume that they testified falsely when they testified that they did not see Ferguson by keeping a lookout, the situation is strongly *a*uggestive—and especially when considered in connection with the testimony of Mr. Thorla and the manner in which Ferguson was injured—that he had been between the cars for some purpose; and that he somewhat suddenly stepped out from that position and came in the path of the oncoming train. This Court—in fact, the jury—would not be warranted in saying that while he was between the cars, the noise of the engine that was

handling the cars that were making up his train, together with the fact that the oncoming train was not giving the usual warning by ringing the bell which would sharply attract his attention to its nearness, was not sufficient to excuse him for not knowing of the close proximity of the train when he stepped out from between the cars; and certainly the blinding effect of the headlight as described by so many witnesses was such that the court cannot afford to say that he was not blinded by it and did not turn away from it or try to get away from the danger that he felt it threatened him with, and in doing so, staggered or stepped in the path of the oncoming train and received the injuries that resulted in his death.

We think that an examination of this evidence shows that Ferguson was working right up to the time the passenger train came in, and that it certainly warrants the conclusion [fol. 402] that he was engaged in inspecting a car just a few seconds before his death; but even if he had not been engaged in inspecting, he was shown to have been in the proper place for his work to have been done a very short time before he was killed, from the testimony of the witness Thorla, and as he was not conclusively shown to have been negligent, we think that the Court of Civil Appeals has committed a very serious error in holding, that Ferguson was guilty of contributory negligence as a matter of law, without proof to sustain such holding.

The Court of Civil Appeals says that the presumption that a person killed by the negligence of another was not guilty of contributory negligence, should be entertained only when the one for whose benefit it is sought to invoke the presumption "was intently engaged at the moment in the line of employment." We do not believe that to be the law, but if in fact it is, we think that the evidence above quoted shows as positively as it is possible for it to be shown without an actual eye witness of the death, that deceased, D. R. Ferguson, was engaged at the moment of his death in the line of his employment.

It is our understanding of the law that the reason for this presumption in favor of the dead man is not because he is shown to have been engaged in a task which showed him not guilty of contributory negligence, for in that event, he would not need any presumption; the only sensible rea-

son for allowing a presumption of care on the part of one killed by the negligence of another is to leave the burden of proving such affirmative defense where it belongs—upon the party guilty of the negligent act, and offering the affirmative defense of contributory negligence. The fact [fol. 403] that the party in whose favor the presumption exists is dead and cannot refute the testimony of the injuring party is the reason for the presumption. It has been held, time after time, by every court in the country, that this presumption can only be overcome by direct proof to the contrary; and we cannot believe that this Court, which is so jealous of the rights of parties before it, will ever let a contrary holding stand over its signature.

We earnestly request this court to carefully examine the testimony above quoted and to consider it in relation to the circumstances of this case, and we believe that such consideration will convince the Court of the grave error that has been committed, and of the burden which will be placed upon parties plaintiff in the future if this opinion is allowed to stand.

In Texas and in the Federal Courts, the burden of proving contributory negligence is upon the defendant.

"In the great majority of American States, the burden of proving the existence of contributory negligence rests on the defendant. This rule has been explicitly affirmed in the following employers' liability cases." (Citing many cases.) La Batt's Master & Servant, Vol. 4, Sec. Ed., p. 4914 Note.

In the body of the text we find this statement:

"It is a principle frequently asserted that if a servant is killed and there are no eye witnesses of the accident, the presumption will be indulged that he was in the exercise of due care; *especially if, when last seen, he was acting with due care and within the scope of his duties.* This principle enures to the benefit of the servant even in those jurisdictions in which the burden of proof is upon the plaintiff, the presumption arising from the instinct of self-preservation being sufficient to sustain the *burden;* in fact, it is *in such jurisdictions only that this principle finds its effective application.*" (Italics ours.)

Thus, in New York, where the burden is upon the plaintiff to disprove contributory negligence, we find:

[fol. 404] "Where an employe is killed and is thus unable to explain his action just prior to the happening of the accident, which no one witnessed, the rule requiring evidence to show affirmatively that there was no contributory negligence is much relaxed; and if, from all the evidence, the jury are justified in finding that the deceased did proceed with the care required of him by law, the lack of direct testimony as to his conduct is not a bar to his recovery. Glennon vs. Star Co., 114 N. Y. Supp. 1044, 91 N. E. 1113."

If such a presumption is to be permitted in jurisdictions where the burden of proving deceased's freedom from contributory negligence is upon plaintiff, under what rule of common sense or law can it be said that the same presumption should not be permitted in this State, where the burden of proof is upon defendant to show contributory negligence?

Under our law, the burden of proving contributory negligence is upon defendant. That means that defendant must establish by direct proof, that deacesed was guilty of contributory negligence. This, it has failed to do.

It is true that the Court of Civil Appeals has found as a matter of fact that deceased was "sitting or squatting" near enough to the track to be struck by the locomotive; but where is the evidence to sustain that finding? The only people (the engineer and the fireman) who could have seen him in such a position have sworn, positively and unequivocally that he was not there; if he was there, the engineer and fireman were not keeping the keen lookout which they say they were keeping, and it should be presumed by this court that the jury so found, since no instructions were asked by the defendant in the trial court and all assumptions and inferences on appeal, should be in favor of the judgment of the trial court.

[fol. 405] The Court of Civil Appeals has simply fallen into an error that is common when a court sitting in offices tries to function as a jury. It may appear a bit easy for a court to sit in the office and figure out a theory of just how a thing happened miles away; but usually, such theory is

just about as liable to be incorrect as to be correct, and it is really best for a court to not indulge in this pastime of getting in the jury box, for it is not always so easy to demonstrate as in this case that the court has come to the wrong conclusion; and in those cases where one cannot demonstrate that the court has come to the wrong conclusion, the judgment of the court setting aside the verdict of a jury is apt to be just as erroneous as in this case, and the error remain uncorrected by reason of the fact that it is not the subject of demonstration as is this case.

It is so well known among the people of our country that the trained mind of the educated man is not always so reliable as that of the common man in disposing of issues of facts and in reaching the truth as disclosed by testimony, that it has usually been held that questions of negligence and contributory negligence are for the jury, except in cases of violation of a statute or where it is impossible for reasonable minds to differ; and in some jurisdictions, it is so clearly appreciated, as in Oklahoma, that it is embodied in the constitution as a part of the organic law that the issue of contributory negligence shall always remain for the determination of the jury.

We point out that one of defendant's in error witnesses testified that he saw the deceased at about six forth o'clock p. m. engaged in his work.

[fol. 406] L. E. Crawford testified:

"I saw Mr. Ferguson again that night after I saw him at the caboose. I seen him about six forth, I imagine it was him. I seen a man working on the train, somebody with a lantern.

Cross-examination:

"He was working on extra 496 north-bound train; that was a freight train, and he appeared to be inspecting the cars, from where I saw him he appeared to be, he was down at a cut of cars. I know how the inspector's work is done, and from where I saw him he appeared to be doing that; he was fifteen or twenty car lengths from me, I expect, something like that, and the crew was making up the train then, they were switching cars down to where they had put

the caboose—they put the caboose on Track No. One next to the main line and then they shoved the cars in on the north end of that caboose, and in that way built up the train on that track. If I remember right about twelve or fifteen cars had been thrown down to the caboose up to the time the passenger train came in, maybe not that many, or maybe more" (S. F. 116-117).

We regret that this testimony and that of the engineer and fireman and that of Nick Franklin as to the manner of making up this freight train was not specifically referred to in appellee's brief; but we thought that the only contention made by appellant as to deceased's contributory negligence was that he was drunk some hours before his death; and since this testimony was disputed, we had no idea that the Court of Civil Appeals would hold that deceased was guilty of contributory negligence as a matter of law, in regard to his position and conduct at the time of his injury, and we believe that, after considering this testimony, together with the authorities above quoted and the authorities quoted in plaintiff's in error printed brief in the Court of Civil Appeals, pages 25 to 47 that the Court will correct this error by granting this motion and affirming the judgment of the trial court.

[fol. 407] We here pause to remark that if he met his death by reason of the glaring headlight—in other words, if it was a proximate contributing cause of his injury, then the defense of contributory negligence would not be available, as his death would have been caused in whole or in part by reason of a violation of the safety appliance regulations.

We respectfully urge the Court seriously to consider the consequences of the ruling announced in this case upon the presumptions which may be allowed as to contributory negligence. An examination of the testimony quoted under this motion for rehearing shows plainly that up to the moment of D. R. Ferguson's death, the train crew which was engaged in making up the freight train upon which he was working was continually shifting cars onto the track No. One, or on the one upon which the freight train was being made up. This made it necessary for Ferguson to be continually on the lookout for cars which were shifted down

by this freight train crew. It is, moreover, entirely probable that Ferguson had gone to one of the cars which had been shifted in by the freight train crew for the purpose of making "light repairs," and that he was coming out from this car or between two cars upon which he had been working at the time the passenger train came in. Plaintiff in error showed from the testimony of living witnesses that Ferguson was at the proper place for him to be working and that he was working shortly before his death (see testimony of Travis Barnhill and Reed Holton, S. F. 55; S. F. 60-61; Appellee's Brief pp. 21-22. See also the testimony of L. E. Crawford and of L. H. Thorla, above referred to). [fol. 408] Now, if the burden of proving contributory negligence is, as we believe, upon the defendant in cases of this kind, wherein can plaintiff in error be called upon to do more than to prove that the deceased was at his proper post and engaged in his proper work when last seen alive? For the Court to require him to prove deceased's conduct up to the moment of his death would be to place the burden upon plaintiff in error, not only to prove that he was not guilty of contributory negligence in cases of injury, but would force him to prove his freedom from contributory negligence when the injured party was dead. Thus, if one were killed because of the negligence of another, and there were no eye witnesses to the death, no recovery could be had for such death, under the reasoning of the Court of Civil Appeals in this case.

We cannot believe that this Court intends to promulgate any such rule. The Court of Civil Appeals may say that deceased "failed to use any diligence to get away from the approaching train, having time to do so," but there is no evidence that deceased knew of the approaching train until it was so close upon him that he had not time to escape it. It may have been that the evidence introduced by defendant in error was strong enough to have justified the jury in saying that deceased was guilty of contributory negligence, but if the evidence introduced by defendant in error in this case is sufficient to force the Court of Civil Appeals to say that deceased was guilty of contributory negligence as a matter of law, then plaintiffs in this State will be in a worse situation than they are in Louisiana and similar

[fol. 409] corporation-ruled principalities, for even in New York, as shown by the case quoted from above, where every burden is placed upon the plaintiffs, in the death of one injured by the negligence of another, in the absence of eye witnesses to that death, the dead man is presumed to have used ordinary care for his own safety.

However, we find that any argument which we seek to offer upon this phase of the case forces us to reason in a circle. We cannot understand how the Court of Civil Appeals arrives at its conclusion as to deceased's having been guilty of contributory negligence as a matter of law, and we cannot offer any more authority—or rather, we will not offer any more authority—than that already presented to the Court in plaintiff's in error printed brief in the Court of Civil Appeals, and the reference to La Batt's Master & Servant above, under which the authorities are collated at some length.

Seventh Assignment of Error

"The Court of Civil Appeals erred in finding as a matter of fact, that the evidence was not sufficient to sustain the finding of the jury that the failure to blow the whistle was an efficient cause of D. R. Ferguson's death."

In answer to special issue No. 9 of the Court's charge, the jury found that the employes of the defendant in error railway company failed to sound the whistle of the said engine as said train approached the yard wherein the said D. R. Ferguson was working. In answer to special issue No. 10, the jury found that this failure to sound the whistle of said engine was negligence. In answer to special issue No. 11, the jury found that "the failure to sound the whistle of said engine (was) a proximate cause of the death of the said D. R. Ferguson, as that term—proximate cause"—[fol. 410] has been defined. Transcript pp. 19, 62. The engineer testified that it was a part of his duty to blow the whistle as he went into the yards at Leesville, and it would have been a violation of the rules not to do it; that it would attract the attention of anybody within half a mile of it that the train was there (S. F. 89).

Without the testimony of the engineer as to his duty to blow the whistle, ordinary common sense would teach us

that the one purpose, and the only purpose, for having whistles on locomotives is in order that persons who may be in the way or near the path of such locomotives may be warned of the approach of the train. It may be argued in some places, and held in some courts, that the railway company owes no duty to warn its employes of the approach of a train. Certainly, however, where the testimony is as it is in this case, that the duty is owed to warn workmen in the yard of the approach of a train, and the only warning signals with which a loc-motive is equipped are the bell and the whistle, it seems clear that a violation of one of these duties to warn is negligence.

For a statement as to the testimony regarding the failure of the employes of defendant in error to sound the warning of the whistle, we respectfully refer the court to our brief filed in this case, pp. 18-24, in the Court of Civil Appeals. It is quite true that several witnesses—among them, the engineer, whose duty it was to blow the whistle—testified that the whistle was blown. It is said that it is the jury's privilege to pass upon controverted issues of fact. [fol. 411] If that saying is true, certainly, it seems to us that the jury was authorized to say that the employes of defendant in error failed to blow the whistle; that the failure to blow the whistle was negligence; and that such negligence was a proximate cause of the death of D. R. Ferguson. It may be quite true that the failure to blow the whistle was not the sole proximate cause of Ferguson's death; nor is it necessary for one single, solitary, isolated act of negligence to be the sole cause of the death or injury of a person, to hold the wrongdoer liable. The person in charge of a loc-motive may be guilty of several acts of negligence at the same time, and we think that the testimony in this case shows that the operator of this passenger locomotive was guilty of several acts of negligence, and that these separate acts of negligence operated as proximate causes of the death of D. R. Ferguson. It might be possible that the failure to blow the whistle "of itself and by itself" was not the sole proximate cause of D. R. Ferguson's death, if the train had been coming in slowly with the bell ringing loud and vigorously; but, with evidence in the case that the bell was not rung, that the train was run at an unusually high rate of speed (when it should have been "under con-

trol"), we think that the Court of Civil Appeals is overstepping its limits and unduly extending its powers in holding that the evidence does not warrant the finding of the jury that the failure to blow the whistle was a proximate cause of the death of D. R. Ferguson; and we earnestly and insistently request the Court to reconsider the evidence and the authorities upon this phase of the case.

[fol. 412] Eighth Assignment of Error

"The Court of Civil Appeals erred in concluding that the evidence does not warrant the finding made by the jury that the speed of the train at the time and under the circumstances was a proximate cause of D. R. Ferguson's death."

For a statement of the evidence as to the speed of the train, we respectfully refer the Court to plaintiff's in error printed brief in the Court of Civil Appeals on file in this case, pp. 18-23 and pp. 58-59. We also call the Court's attention to plaintiff's in error first five counter propositions under defendant's in error twenty-ninth, fortieth, and forty-first assignments of error, plaintiff's in error printed brief in the Court of Civil Appeals, pp. 9, 10, together with the statement and argument thereunder.

The engineer of the passenger train testified that he was required to keep his train under control in going through the yard at Leesville (S. F. 89). When a person speaks of keeping a moving vehicle, such as a train, an automobile or any other wheeled vehicle, under control, it means that it can be stopped practically at once. If it was the engineer's duty to keep this passenger train under control when going through the yards at Leesville, as he testified it was his duty to do, and there is testimony which would justify the jury in saying that the train was not kept under control as it came through the yards at Leesville because it was running at a higher rate of speed than usual and customary, it seems to us that the jury was justified in finding that the train was run into and through the yards at Leesville at an unusually high rate of speed; that running it through the yards at such speed was negligence; and [fol. 413] that such negligence was a proximate cause of the death of D. R. Ferguson. We are pointed to no au-

thority, nor are we given the benefit of any reasoning of the Court of Civil Appeals as to why the jury was not justified in so finding, and we earnestly request the Court that if they continue to hold, as the opinion stands now, that there was not sufficient evidence upon the issue of the speed of the train and the failure to blow the whistle, to warrant the jury in finding that one or both of them were efficient causes of Ferguson's death, that they explain to us why the jury is not justified in finding that such failure to blow the whistle and the operation of the train at such speed were not efficient causes of D. R. Ferguson's death.

We shall not further extend this motion by quoting additional authorities upon the undoubted power of the jury to pass upon the issues of fact; but we cannot refrain from saying that if the Court intends to say that the jury no longer has that power, that it should say so in plain words. It is true that the Court of Civil Appeals says that "each issue of negligence was separately submitted and found by the jury to be a distinctive act of negligence," but each issue was submitted to the jury for their determination as to whether or not it was *a* proximate cause of the death of D. R. Ferguson. It could not posssibly be true that the jury found that each act of negligence separately and distinctly was *the* proximate cause of D. R. Ferguson's death. The ordinary usage of the words "a" and "the" does not permit such construction of the jury's answers to the special issues.

It is the writer's understanding of the law that where there are various issues of fact to be determined in a case, that the issues are submitted to the jury for their determination, but that the jury is supposed to have some few [fol. 414] grains of intelligence, and to answer the questions submitted to them as they relate to the case—not as abstract propositions unrelated to each other.

We shall not further extend this motion by quoting additional authorities upon the power of the jury to pass upon disputed issues of fact, as it is believed that the Court has not intended to deprive the jury of this power.

Ninth Assignment of Error

"The Court of Civil Appeals has erred in reversing and remanding the entire cause for a new trial, in that, under

the findings of the Court of Civil Appeals, the error "affects part only of the matter in controversy and the issues are severable," and the cause should only be reversed and remanded on the question of damages assessed, for the purpose of permitting the trial court to try and determine the amount that should be deduced on account of the contributory negligence of the deceased."

The original opinion in this case, as well as the third opinion, which, for the second time, reverses this court in the same case, proceeds upon the theory that the case should be reversed and remanded for the sole reason that the verdict is excessive. In fact, that is the only reason for reversing the case, it being said that the findings of the jury are otherwise satisfactory, and that by reason of the verdict being excessive in that no deduction was made on account of the contributory negligence of the deceased that the court is without authority to require a remittitur.

Inasmuch as the case is reversed solely by reason of the fact that some deduction was not made on account of the contributory negligence of the deceased, why should this entire case be sent back for another trial? Why should not that question, and that question alone, be referred back to the trial court for a disposition thereof by a jury, if a jury be demanded, for the settlement of that question?

[fol. 415] I am not unmindful of the fact that it is generally conceded that it is very uncertain what force and effect should be given to Rule 62a, if in fact any, especially in the light of subsequent decisions; but, all fairminded men must be impressed with the advisability if not necessity of some improvement in bringing about the final end of litigation—in fact, a great many of us believe that is one of the most important things connected with a lawsuit. Here is a case that was brought in the District Court of Bowie County, and before it could be tried, it was transferred to the Texarkana Court at Law, where it reposed until the Supreme Court decided that court was unconstitutional, and it was then transferred back to the District Court of Bowie County. It is true that on one trial, there was a hung jury, but we are nevertheless confronted with the fact that more than four years have elapsed since Mr. Ferguson was killed. The case has been tried by a competent trial judge and a fair jury, and a verdict rendered

and a judgment entered in favor of the dependants of Mr. Ferguson. The usual appeal followed, and this court reached the conclusion that Ferguson was guilty of contributory negligence as a matter of law, disagreeing with the trial court and the jury that it was an issue of fact which should have been and was determined against the Railway Company. In due time, a Motion for Rehearing was filed, and this court granted the motion and held that it was an issue of fact as to whether Ferguson was guilty of contributory negligence and that the judgment should stand. In due time, the appellant filed a motion for rehearing, and the court now has taken back the second opinion and writes the third opinion, saying that it adheres to the doctrine announced in the first opinion, namely, that Ferguson was guilty of contributory negligence as a matter of [fol. 416] law, notwithstanding there is no evidence to sustain that finding, and notwithstanding that, as we believe, the reasoning by which it is endeavored to be supported on the application of known physical facts, is very faulty.

We insist that even if this court shall adhere to what appears to be an erroneous conclusion, namely, that Ferguson was sitting or squatting on the ends of the cross-ties, or was in a stooping position when struck, that it does not constitute contributory negligence as a matter of law, but on the contrary, raises an issue of fact for the jury. But if this court persists in holding Ferguson was guilty of contributory negligence, we most earnestly insist that if there was ever a case in which the doctrine of referring back only the matter in actual controversy, where the opinion of the Court of Civil Appeals only reverses the case on the one issue, should be applied, it seems to me that it should in this case.

General or Concluding Argument

It occurs to us that the Court of Civil Appeals has clearly erred in the particulars referred to in this petition, and that as we will endeavor to later point out that this court should grant a writ of error—correctly declare the law and refer the case back to the Court of Civil Appeals for further proceedings not inconsistent with the law—but before discussing that point, we call attention to the fact that if the failure to dim the headlight operated as a proximate

cause of Ferguson's death, that it eliminated all questions of contributory negligence. For a full and complete dis- [fol. 417] cussion of the headlight law, we respectfully refer this court to our (Appellee's) printed brief in the Court of Civil Appeals, pages 48 to 57, inclusive, where the laws, rules, and regulations are quoted and the principles discussed. We also call attention to the fact that J. F. Anderson, a witness for defendant in error, and Superintendent of Terminals for the Chicago, Milwaukee, and St. Paul Ry. Co., testified, (S. F. 115):

"It is a fact that a man in front of one of those bright lights can't look at it, and if he does, it will blind him and confuse him if he looks at it."

We hope this court will seriously consider the evils brought about, by, without exception, remanding to the trial court all cases which the Court of Civil Appeals have reversed and remanded on account of, (as it erroneously conceived), there being no evidence to support the judgment. We realize that it not infrequently occurs that this Court will, when of the opinion that errors have been committed by the Court of Civil Appeals, which should be avoided on another trial, deny the writ, but in doing so state its disapproval of the holding of the Court of Civil Appeals on the law. We realize that it is difficult for this Court to be induced to change even a bad precedent. But it should seriously consider the mischief that has been wrought in not referring these cases back to the Court of Civil Appeals for further proceedings. Doubtless, many cases would be ended by the Court of Civil Appeals affirming the trial court judgment. This Court has the right to refer such cases back to the Court of Civil Appeals. It is confidently believed that this Court will correct some, if not all, the errors of law committed by the Court of Civil Appeals in this case—especially will it be held that Ferguson's contributory negligence was not established as a matter of law, and therefore should be compelled to take such steps as [fol. 418] will leave that issue of fact to a jury if another trial is to be had. Now bearing in mind—that as shown by the written opinions of the Court of Civil Appeals that on March 18th, 1926, all members of this Court held it was an issue of fact and affirmed the judgment of the trial court—

and that on the 24th day of June, 1926, when the case was for the second time reversed, that an able member of that Court was still of the opinion that it was an issue of fact, and that the judgment of the trial court should be affirmed, it occurs to us a strong case and reason is presented for this Court to refer the case back to the Court of Civil Appeals with the advice that Ferguson's contributory negligence was not established as a matter of law, and that the question of the defendant's in error violating the safety appliance law, and its negligent speed and its negligent failure to blow the whistle being proximate causes of the injury, were issues of fact for the jury, and permit the Court of Civil Appeals to pass upon the whole case in the light of such advice.

Again referring to the error committed by the Court of Civil Appeals by in some unfathomable way asserting that Ferguson's sitting or stooping on or near the track in a negligent way and that he was guilty of contributory negligence as a matter of law, we must say that such conclusion is based on matters not found in the record; and against a theory accepted and acted upon by both plaintiff in error and defendant in error in the trial and appeal of this case.

The defendant in error, in its Motion for Rehearing of that same opinion (pp. 3-4), stressing the fact that it was conceded and accepted as a fully established fact, used the following language:

[fol. 419] "The engineer and fireman were keeping a lookout, and so long as they could see about the place where the deceased was struck, he was neither upon the track, nor so close thereto as to be in danger of being struck by the locomotive. There was no evidence introduced at the trial from which the jury, or the court, could reasonably find that deceased was sitting or squatting dangerously near the track at any time when the engineer and fireman, by keeping a diligent lookout, as they did, could have seen him. The circumstantial evidence in this case points, in our opinion, to the fact that the deceased, while under the influence of liquor, and being grossly careless and negligent, and having no regard for his own safety, and while the locomotive was passing over that part of the track near

which he was, either walked or stumbled so close to the track as to be struck by the pilot beam of the locomotive."

The writer can conceive that if the appellant and the appellee should both mis-cite the testimony of witnesses and reach a joint conclusion in conflict with the evidence, or if they should take a position that was contrary to the undisputed evidence in the case, the Court of Civil Appeals would have the right to declare itself not bound by the agreement or attitude thus taken by the parties, and declare the facts to be as disclosed by the evidence. However, when, as in this case, the position taken by the appellant and by the appellee with reference to the manner in which the injuries were inflicted, and with reference to the construction to be placed upon the testimony as a whole on this point, is not inconsistent with the facts to the extent of being in conflict with the undisputed facts, we respectfully submit that it is the duty of the Court of Civil Appeals to accept the conclusion thus reached and announced by the respective parties to the suit and dispose of the question in harmony with the position taken by the parties. The court should no more interfere with the agreement thus reached by the parties as to the facts than it would if it had been solemnly stated in a written agreement signed and filed as a part of the proceedings on the trial of this cause.

[fol. 420] It occurs to the writer that this court should pause, stop and take its bearings, and realize that if the appellant had stated as a part of the undisputed facts in this case in its original statement of the nature and result of the case, that Ferguson was in an erect position, and that the pilot beam of the engine struck his torso and inflicted upon him the injuries which resulted in his death, and if the appellee had accepted that statement as true by declining to contradict it in his statement of the case, the Court of Civil Appeals would have been bound to have accepted such statement of the case as true and to have proceeded accordingly. Now, is the force of this rule lessened by the fact that the appellee makes the statement and appellant accepts the same as true, or by the fact that it is a conclusion reached by the open signed declaration of each party to the

suit in different papers instead of being embodied in one paper?

This case presents the further anomaly that the plaintiff in error complains of the failure of the defendant in error to dim the very bright headlight, and the defendant in error emphasized the fact that it did not dim it and that it had a very, very bright headlight indeed, and that it was very necessary to have such a headlight so as to be able to see up and down the track, and with much gusto, it then contends that if Ferguson had been on the track, the engineer would have seen him, and that he was not on the track because the fireman and the engineer did not see him, and the appellee agrees that the engineer and the fireman did not see him because he was not there to be seen; and yet, the Court of Civil Appeals, without a particle of evidence other than such theories as it can draw upon its imagination to establish, solemnly finds and declares that Fer- [fol. 421] guson was on the track, could have been seen by the engineer, but for some unexplainable reason, it refuses to accept the sworn statements of the Railway's engineer and fireman, the solemn declaration made by the appellant's attorneys in its Motion for Rehearing, and the earnest if not forceful contention presented by the appellee, all to the effect that Ferguson was not on the track, was not in a stooping or sitting position when struck, that the pilot step did not strike him, but that the wound inflicted to his torso was by being struck by the pilot beam.

The Court of Civil Appeals places itself in a rather peculiar, if not awkward, position when it says that though the appellant declares that it relies upon the truthfulness of the testimony of its engineer and fireman upon a certain point, and though the appellee declares that he relies upon the truthfulness of the testimony of the engineer and the fireman on the particular point, and though there is no contradictory evidence, no other explanation, no other witness testifying on that point, still assumes the role of ferreting out the truth and reaching a conclusion wholly inconsistent with the theory upon which the case was tried. This becomes a much more peculiar situation for the court to find itself in when it is so easily discoverable by the application of any of the rules of physics or science known to us, the court cannot sustain the contention made in the position it has taken.

The defendant in error alleged in its answer that Ferguson's duties required him "to go between, over and across the tracks." We think that we are justified in emphasizing to this court the fact that Ferguson would not have [fol. 422] been guilty of contributory negligence by sitting on the ties or in squatting on or near them, any more than he would have been in crossing the track or walking upon the track while at or near his post of duty. If he was guilty of contributory negligence, it was in remaining on the track until he was struck. The question of whether he was guilty of contributory negligence in that respect, even if it were conceded that he was on the track sitting or squatting, must necessarily be disposed of as an issue of fact, for the reason that the evidence disclosed that the failure to ring the bell and other expla-nable reasons may have induced him to overlook and fail to appreciate the dangerous proximity of the train, until it was too late.

The court, in its original opinion, declares, after having stated that Ferguson was seen at the north end of a string of cars, that he had already inspected those cars and there therefore, he was engaged in no other work for the next twenty minutes preceding his death. Doubtless, the court reaches that conclusion by reason of the fact that the lantern was in the same position between the tracks after Ferguson was killed as it was when he was last seen alive—that is to say, if we conclude that he was last seen alive by the Barnhill boy and others; but, it does not appear that his lantern was in the same spot north and south, simply in the same spot relatively speaking, east and west—that is, half way between the tracks. Now, it is not inconsistent with the evidence and the facts to be inferred from the evidence in the case to reach the conclusion that Ferguson had returned to his work of inspecting. The only evidence of the cars having been inspected before the boys saw him and his lantern remained in that position, or whether some of the cars were inspected after the boys saw [fol. 423] him, and as to whether Mr. Thorla saw him walking north along the string of cars just a few minutes before he was killed, and as to whether he had picked up his lantern after the boys saw him and carried it to another place between the two tracks and set it in the same position and had gone between the cars to do some little work or inspec-

tion or connect up the hose is not definitely shown by the testimony, but the inference does arise that during that time, he was not engaged in any conduct which would constitute negligence upon his part proximately resulting in his death. Myers case, supra.

The court, in its original opinion, seems to lay some stress upon the fact that the train made a great deal of roaring noise and that a very bright headlight was shining down the track and that the deceased should have gotten out of the path of danger before the train arrived. This process of faulty reasoning seems evident to anyone who will think for a moment. Suppose it was true that the deceased, while waiting in the line of his work, sat down on the end of a cross-tie rather than stand and rest his hand against a car "in this fifteen minutes before the train arrived, expecting that other cars would soon be sent down and his work would be resumed," what crime has he committed in doing so? Probably, he assumed, if he did that, that other cars would be sent in in a few minutes and that he would be up inspecting them before the passenger train arrived. It is not at all probable, it is not inferable, that the deceased kept a tab on the time that was passing and knew exactly when the passenger train was due, but suppose that *that* he heard the roaring of the passenger train, and that by reason of the fact that he had the right to as- [fol. 424] sume that it would on this occasion, as it had done before, come along there on its good behavior ringing the bell to advise him of its nearness before it reached the point of close proximity, and that he hesitated from moving his tired body from the end of the tie, lulled into a sense of security by reason of the bell not having been rung—until he was not able to extricate himself from the situation without being injured. Under these circumstances, the failure to ring the bell being actionable negligence which proximately caused his injury, it cannot be said, as a matter of law, that his failure to jump from the track at the first knowledge that the train was approaching, though not near, constitutes contributory negligence as a matter of law.

Your petitioner respectfully prays that this petition be granted and the Writ of Error allowed for the correction of the error of law herein complained of; and that upon hearing, the judgment of the Court of Civil Appeals be re-

versed and the judgment of the district court be affirmed, or that the said cause be remanded to the Court of Civil Appeals for proceedings not inconsistent with the law as declared by this court.

Respectfully submitted,

S. P. Jones, Jones, Jones, and Buck, Marshall, Texas; Keeney and Dalby, Texarkana, Texas, Attorneys for Plaintiff in Error.

[File endorsement omitted.]

[fol. 425] IN SUPREME COURT OF TEXAS

App. 14984

FRANKLIN JONES, Admr.,

vs.

KANSAS CITY SOUTHERN RY. CO.

From Bowie County, 6th Dist.

ORDER GRANTING WRIT OF ERROR—December 8, 1926

This day came on to be heard the application of plaintiff in error for a writ of error to the Court of Civil Appeals for the 6th District, and the same having been duly considered, it is ordered that the application be granted and the writ of error issue as prayed for, upon the filing by applicant of a bond in the sum of $200.00, conditioned to pay the costs of this court, the Court of Civil Appeals and District Court, payable to the adverse party as prescribed by law.

[fol. 426] IN SUPREME COURT OF TEXAS

ORDER REFERRING CASE TO SECTION "B" OF COMMISSION—December 15, 1926

The following cases were referred to Section "B" of the Commission of appeals: * * * No. 4730, Franklin Jones, Admr., vs. Kan. City Southern Ry. Co. Bowie Co., 6th District.

COMMISSION OF APPEALS, SECTION B

No. 762-4730

FRANKLIN JONES, Admr. (Leonard Jones), Plaintiff in Error,

vs.

KANSAS CITY SOUTHERN RAILWAY CO., Defendant in Error

From Bowie County, Sixth District

OPINION OF COMMISSION—Filed February 23, 1927

This is a death action instituted by Leonard Jones, administrator of D. R. Ferguson, deceased, against the Kansas City Southern Railway Company. The action was brought under the Federal Employer's Liability Act for the benefit of the minor children of D. R. Ferguson, deceased.

The case was tried before a jury, upon whose findings the court entered judgment for the plaintiff, but that judgment was reversed and the cause remanded by the Court of Civil Appeals. That court first reversed and remanded, later, upon the motion for rehearing it affirmed, and still later upon a further rehearing it returned to the original [fol. 427] judgment of reversal and remanding. Chief Justice Wilson dissented upon the last rehearing and expressed his view that "the proper disposition of the appeal was made when the judgment of the court below was affirmed." (282 S. W. 309; 287 S. W. 304.)

The judgment was reversed, the court through its majority holding that the facts showed as matter of law that the deceased was guilty of contributory negligence proximately contributing to his death, and the cause was remanded, since there was nothing in the record from which it could estimate the amount to be deducted from the recovery under the Federal act. The issue of contributory negligence had been found in the trial court in favor of the administrator. It is clear, we think, this holding of the majority is upon a question of law, for Justice Levy, writing for the majority, leaves no room to think otherwise. He says:

"The negligence of the railway company, as could be found by the jury, in failing to ring the bell, as customarily done, was not the sole cause, but a concurring cause of the injury. *The negligence of the deceased contributed to his injury.* Hence the injury was partly the result of the negligence of the company and *of the negligence of the deceased.*" (Italics ours.)

This clearly indicates the Court of Civil Appeals was making its own finding of negligence, which it could only do as matter of law. If it had meant to reverse for the insufficiency of the evidence to support the verdict as matter of fact, it would have remanded the cause for a jury finding upon that issue, (Taber v. Dallas County, 101 Tex. 241, 106 S. W. 332) the evidence being at least conflicting.

In the opinion on the first rehearing, when the judgment of the trial court was affirmed, it is stated:

"Both the appellant and the appellee now challenge the conclusion of fact and say 'there is no evidence from which the jury or the court could reasonably find that deceased was sitting or squatting dangerously near the track.'"

[fol 428] This was the finding of fact upon which was based the court's conclusion that the deceased was guilty of contributory negligence as matter of law and to which conclusion the majority returned on defendant in errors' motion for rehearing. On the administrator's motion for rehearing, whereon the judgment was affirmed, the case was considered upon the basis of the facts found and the evidence, unaffected by the Court's conclusion of law that the deceased was guilty of contributory negligence and it is to this opinion Chief Justice Wilson adheres in his final dissent.

We think the views of Chief Justice Wilson as expressed in the opinion last above referred to are correct and that the Court of Civil Appeals through its majority erred in its holding that the facts showed as matter of law that the deceased was guilty of contributory negligence proximately contributing to his death. No useful purpose would be subserved in adding to what was said in the opinion for affirmance by the Court of Civil Appeals.

We therefore recommend that the judgment of the Court of Civil Appeals be reversed and the judgment of the trial court be in all respects affirmed.

Ocie Speer, Judge.

In Supreme Court of Texas

[Title omitted]

Order as to Judgment—February 23, 1927

Judgment of the Court of Civil Appeals reversed and that of the District Court affirmed, as recommended by the Commission of Appeals.

C. M. Cureton, Chief Justice.

[fol. 429] In Supreme Court of Texas

No. 4730, No. 762

Franklin Jones, Admr. (Leonard Jones),

vs.

Kansas City Southern Ry. Co.

From Bowie Co., 6th Dist.

Judgment—February 23, 1927

This cause having been referred to the Commission of Appeals for their examination and report, and said Commission having reported in a written opinion by Hon. Ocie Speer, Judge of Section "B," that there was error in the judgment of the Court of Civil Appeals but no error in that of the District Court, and recommending that the judgment of the Court of Civil Appeals be reversed and that of the District Court be affirmed, and such report together with the record in the cause having been duly considered and the judgment as recommended by the Commission of Appeals having been approved by the Court, it is therefore ordered, adjudged and decreed that the judgment of

the Court of Civil Appeals be reversed and the judgment of the District Court be in all things affirmed. That the plaintiff in error, Franklin Jones, Administrator of the [fol. 430] estate of D. R. Ferguson, deceased, do have and recover of and from the defendant in error, Kansas City Southern Ry. Co. and its surety, American Surety Company, of New York, the amount adjudged in the District Court, together with all costs in this behalf expended in this court, Commission of Appeals and Court of Civil Appeals, and this decision be certified to the District Court for observance.

IN THE SUPREME COURT OF TEXAS (BEFORE COMMISSION "B")

[Title omitted]

MOTION FOR REHEARING—Filed March 9, 1927—AND ORDER OVERRULING SAME

Now comes the Kansas City Southern Railway Company, defendant in error in the above styled cause, and prays that this court set aside its judgment rendered in this cause heretofore, on February 23, 1927, reversing the judgment of the Court of Civil Appeals rendered therein, and affirming the judgment of the District Court of Bowie County rendered therein, and grant a rehearing of this cause, and upon such rehearing, that this court affirm the judgment of the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas, reversing the judgment of the District Court of Bowie County, and remanding the cause to that court for a new trial.

[fol. 431] As grounds or reasons for this motion, the defendant in error urges that the court, in its judgment rendered herein as aforesaid, committed errors as follows:

1

This court erred in reversing the judgment of the Court of Civil Appeals rendered by its majority in this cause, and affirming the judgment of the District Court of Bowie County rendered therein; this was error, because the Court

of Civil Appeals of the Sixth Supreme Judicial District of Texas, by its majority, not only reversed the judgment of the District Court of Bowie County, Texas, rendered in this cause, but remanded the cause to the District Court of Bowie County for another trial. The Court of Civil Appeals reversed the judgment of the District Court of Bowie County, and remanded the cause to that court for a new trial, as is manifest from the opinion of its majority, because it found and decided contrary to the finding of the jury on that issue, that the deceased, D. R. Ferguson, was guilty of contributory negligence which partly and proximately was a cause of his death; and whether such decision of the Court of Civil Appeals that deceased was thus guilty of contributory negligence, be found or characterized by this court as the decision of a question of law, or the decision of a question of fact, since said Court of Civil Appeals did not render a final judgment in this cause, but remanded it to the District Court of Bowie County, Texas, for another trial, its action is binding on this court under and by virtue of the provisions of Section 6, of Article 5, of the Constitution of Texas, concerning Courts of Civil Appeals, and providing: "The decision of said courts shall [fol. 432] be conclusive on all questions of fact brought before them on appeal"; and under the provisions of Article 1820, Revised Statutes of Texas (1925), reading: "The judgments of the Courts of Civil Appeals shall be conclusive in all cases on the facts of the case."

2

The decision rendered by this court in this cause is erroneous, for the further reason that although this court may disagree with said Court of Civil Appeals in its decision or finding that the deceased was guilty of contributory negligence, proximately causing his death; or that he, if guilty of such negligence, was guilty thereof as a matter of law, for the reason that although the Court of Civil Appeals may have decided that the deceased was guilty of contributory negligence as a matter of law, its decision or finding to such effect must, under repeated decisions of this court, be construed by this court to embrace the lesser findings, or as being tantamount to findings that deceased was guilty of contributory negligence as a matter of fact; and that

the finding of the jury, to the effect that deceased was not guilty of contributory negligence, proximately contributing to his death, was either contrary to the evidence introduced at the trial, or was not supported by the evidence at the trial, or was against the preponderance of the evidence introduced at the trial.

3

The decision rendered by this court in this cause is erroneous, because it, in effect, ignores or is violative of the provisions of Section 6, of Article 5, of the Constitution of Texas, and the provisions of Article 1820, of the Revised Statutes (1925) of Texas, and is contrary to an unbroken [fol. 433] line of decisions by this court, including the following decisions, to-wit:

Marshburn et al. vs. Stewart et al., 260 S. W. 565;
Mason vs. Peterson, 250 S. W. 142;
Brown vs. City Service Co., 245 S. W. 656;
Electric Express & Baggage Co. vs. Ablon, 218 S. W. 1030;
Barron vs. H. E. & W. T. Ry Co., 249 S. W. 825;
Chapman vs. Kellogg, 252 S. W. 151;
Rodgers & Adams vs. Lancaster, 248 S. W. 660;
Tweed vs. W. U. Tel. Co., 177 S. W. 957;
Southern Cotton Oil Co. vs. Wallace, 38 S. W. 1137;
Pollock vs. H. & T. C. R. R. Co., 103 Texas, 69;
Lee vs. I. & G. N. Ry. Co., 89 Texas, 583.

Statement

By its first judgment rendered in this cause on February 25, 1926, (282 S. W. 309), the Court of Civil Appeals, by a unanimous opinion, reversed the judgment of the District Court of Bowie County, and remanded the cause for another trial. In its first opinion rendered in this cause, and among its findings of fact, the Court of Civil Appeals made the following finding:

"All the circumstances pointed to the fact that he contributed to the cause of his death by knowingly remaining in a position to be struck by a train which he had reason to expect, and the glare of the headlight and the rattle of

which he could have seen and heard when it was some distance away."

In such first opinion, the court further found and decided as follows:

"The deceased failed to use any diligence to get away from the approaching train, having time to do so; and a judicial finding to the contrary is not warranted. Therefore, in determining the result of the case, it is essential to view the conduct of the Railway Company and of the deceased as a whole, and note the bearing each had upon the resultant injury. The negligence of the Railway Company, as could be found by the jury, in failing to ring the bell as customarily done, was not the sole cause, but a concurring cause of the injury. The negligence of the deceased contributed to his injury. Hence, the injury was partly the result of the negligence of the company, and of the negligence of the deceased: the legal consequences being as they each were in fault, the amount of the recovery should be diminished, as that is the legal effect of contribu-[fol. 434] tory negligence. The present verdict is then excessive, as no deduction of amount was made by the jury. This court cannot direct a remittitur, since the parties to the suit are entitled to a jury finding in that respect. It is incumbent upon the court to remand the cause in such situation."

In the last or majority opinion of the Court of Civil Appeals rendered in this cause on June 24, 1926, (287 S. W. 304), the court said:

"After an extended re-consideration of the record, it is believed by the majority of this court that the original disposition of this case on appeal should be adhered to, as all the circumstances unite in reasonably indicating that the cause of the deceased being struck and killed by the oncoming engine, was as stated in that opinion. The record is far more in harmony with the inference that at the time the deceased was struck by the oncoming train, he was sitting or squatting dangerously near the main line track, with his face toward the cars he had been inspecting, than that the deceased came out suddenly from between the cars on the passing track, and unexpectedly collided with the

moving engine on the main line at some moment of its passing. Had the deceased done the latter thing, the wounds on his body would necessarily have been of a different character, and upon different parts of the body, and his body would not have been projected, as done, some distance in the direction the train was moving.

"It is true, the engineer and fireman testified that they were keeping a lookout, and did not see Mr. Ferguson or any other man on or near the main line track in going through the yards. Yet, the physical facts show that the deceased must have been on or very near the main line track at the time of the passing of the engine; otherwise, he would not have been struck and killed by the engine. The blood spots on the pilot beam, and the right step, in connection with the injuries on the body of the deceased, and the fact that his body was projected forward some distance in the direction of the moving train, all speak for themselves. The more reasonable conclusion is that the operatives of the engine failed to observe the deceased. The order of affirmance is set aside, and the judgment, as before determined, is reversed and the cause is remanded for trial".

Remarks

From the two opinions of the Court of Civil Appeals from which we have thus quoted, it unmistakably appears to us that the Court of Civil Appeals found as a matter of fact that deceased was guilty of negligence at the time [fol. 435] he was killed, which proximately contributed to cause his death. If, however, it be correctly held that such finding amounts to a finding by the Court of Civil Appeals that deceased was guilty of contributory negligence as a matter of law, such finding nevertheless embraces the lesser finding that he was guilty of contributory negligence as a matter of fact; and that the finding of the jury to the effect that he was not guilty of contributory negligence, was contrary to the evidence, or not supported by the evidence, or was against the preponderance of the evidence.

It must be noted that the Court of Civil Appeals did not render any final judgment in this case, but set aside the judgment of the trial court, which, of course, embraced a setting aside of the findings of the jury, and remanded the cause to the District Court of Bowie County for a new

trial. It did not substitute its own judgment for the judgment of the trial court. It merely reversed the judgment of that court, because it found, in effect, that under the evidence, the jury should have found that deceased was guilty of contributory negligence. In so doing, the Court of Civil Appeals was passing upon the facts. Its judgment upon the facts of the case is conclusive on this court, as is manifest, it appears to us, from what has been said by this court in the following cases:

In Mason vs. Peterson, 250 S. W. 142, The Commission of Appeals said:

"Where the Court of Civil Appeals has held that the evidence is insufficient as a matter of law to support the verdict, this holding, though reversed by the Supreme Court, is tantamount to, and embraces in effect a finding that the evidence is insufficient as a matter of fact; that such finding by the Court of Civil Appeals is final, and [fol. 436] binding upon the Supreme Court", citing Brown vs. City Service Company (Tex. Com. App.), 245 S. W. 656.

In Brown vs. City Service Company, cited above, the court said:

"The court of Civil Appeals held that the burden of proof was upon the plaintiffs to show that the driver of the automobile did the wrong — while acting within the scope of his employment, and complaint of that holding is made. The holding of the Court of Civil Appeals on that phase of the case is correct. That the driver of the automobile was acting within the scope of his employment at the time of the injury, was an element of plaintiffs' cause of action necessary to their recovery. The burden of proof rests on the party affirming a fact in support of his cause. We think the testimony above quoted is sufficient to sustain that burden, unless overthrown by defendant's testimony. Whether testimony in behalf of defendant is sufficient to overthrow that in behalf of the plaintiffs on that issue, was a matter within the province of the jury to determine, since there was evidence to support plaintiff's contention thereon, subject, however, to the judgment of the court of Civil Appeals on the question and effect of the preponderance of the evidence.

"Section 6, Article 5, of the Constitution concerning Courts of Civil Appeals, provides that 'the decision of said court shall be conclusive on all questions of fact brought before them on appeal or error.'

"Article 1590, Revised Civil Statutes, 1911, prescribing 'the judgments of the Court of Civil Appeals shall be conclusive in all cases on the facts of the case,' is but a legislative recognition of the Constitutional provision above quoted. 'The right of trial by jury shall remain inviolate.' (Constitution, Article 1, Sec. 15). Article 5173 of our statutes is only a legislative recognition of that fundamental rule. It is the province of the jury to determine questions of fact. It is within the power of the trial judge to set aside the finding and order a new trial. If, in the judgment of the trial court, the finding should be set aside, but upon appeal the Court of Civil Appeals concludes that there is such a preponderance of contrary evidence that the finding should be set aside, it may do so and remand the case for a new trial under the Constitutional and statutory provisions above quoted.

"But nowhere is authority given to the trial court, or to the Court of Civil Appeals in such cases, to set aside the verdict of the jury and substitute its own findings, instead of the findings of the jury, and render judgment according to its own findings. Interpreting the language of [fol. 437] the Court of Civil Appeals, 'in the face of these undisputed facts, the circumstances relied on by appellees are not sufficiently tangible to form the basis of a verdict, to hold not that there was no evidence to support the verdict of the jury, but that there was such a preponderance of the evidence against the verdict that the judgment of the trial court should not be allowed to stand, we recommend that the judgment of the trial court, and that of the Court of Civil Appeals be reversed, and that the cause be remanded to the District Court for a new trial.'"

In adopting the judgment of the Court of Civil Appeals, in Mason vs. Peterson, supra, the Supreme Court not only adopted the report recommended by the Commission of Appeals, but expressly stated that they approved the holding of the Commission on the question discussed in its opinion.

In Marshburn vs. Stewart, 260 S. W. 565, Judge Greenwood said:

"This case comes within the rule that in a case remanded by the Court of Civil Appeals for a new trial on the facts, its findings of no evidence, though one of law, must be held, in the absence of contrary language, to include the finding of insufficient evidence, though one of fact; and that hence, the order of remand must be respected by the Supreme Court. The Constitution and Statutes defining and regulating the jurisdiction and practice of the Supreme Court, and of the Courts of Civil Appeals, have been uniformly so construed since a few years after their adoption. We followed the rule in the first judgment herein, and erred in departing therefrom in our second judgment."

In Southern Cotton Oil Company vs. Wallace, 38 S. W., 1137, the Court of Civil Appeals decided the single question that the Oil Company was entitled to a peremptory instruction, and thereupon reversed a judgment for Wallace, and remanded the case for a new trial in the District Court. The decision was of a question of law. Nevertheless, when the decision was reversed as erroneous, the judgment of the court below was not affirmed.

The court, per Justice Brown, gave the following reason for not affirming the trial court's judgment:

[fol. 438] "The Court of Civil Appeals erred in holding that the District Court should have instructed the jury to find for the defendant, but that court had the authority to reverse the case, because the evidence was not sufficient, and we consider that the insufficiency of the evidence was necessarily embraced in the finding of the court that there was no evidence to sustain the plaintiff's claim that he was the servant of the defendant below; hence, we cannot reverse the judgment of the Court of Civil Appeals and affirm the judgment of the District Court, for this case will be remanded to the District Court for trial in accordance with this opinion."

In Electric Express & Baggage Company vs. Ablon, 218 S. W. 1030, Ablon sued the company to recover damages for personal injuries. The company defended on the ground that he was guilty of contributory negligence. The cause

was submitted to the jury on special issues, including an issue submitting the contributory negligence of Ablon. The jury found that Ablon was guilty of contributory negligence, and judgment was rendered for the company. On appeal to the Court of Civil Appeals, that court held, in effect, that there was no evidence authorizing the finding of the jury that Ablon was guilty of contributory negligence, and reversed the judgment of the trial court, and remanded the cause for another trial. On writ of error, this court said:

"A portion of the opinion of the Court of Civil Appeals may indeed fairly be construed as being to the effect that there was no evidence tending to support the finding of the jury on said special issues. Nevertheless, that court, in the exercise of its clear constitutional and statutory authority and discretion, in dealing with the facts of this case, has seen fit to enter its judgment *reversing the judgment of the trial court and remanding the cause to that court for a* new trial on the facts. Upon the facts, *that judgment* of the Court of Civil Appeals, rather than argumentative portions of its opinion, is of controlling importance. Logically and necessarily, *that judgment* involves in its support a decision or finding of fact by that appellate court to the effect that the evidence was 'insufficient,' rather than that there was no evidence in support of the finding [fol. 439] of the jury on said special issues. Pollock vs. Ry. Co., 103 Texas, 69; 123 S. W. 408. Lee vs. Ry. Co., 89 Texas, 583, 36 S. W. 63; Tweed vs. Ry. Co., 107 Texas, 247; 166 S. W., 696; 177 S. W., 957. (Italics ours.)

"Under the above provisions of our Constitution, and of Article 1590 and our established practice, that decision of finding of fact by that court, and its corresponding order of remand, are conclusive and consequently binding upon this court," citing many authorities.

In Barron vs. Houston, East and West Texas Railway Company, 249 S. W., 825, Barron sued the company for damages on account of personal injuries. The company defended on the ground, among others, that he was guilty of contributory negligence. At the trial, he recovered judgment. On appeal to the Beaumont Court of Civil Appeals, that court Justice Walker dissenting, held that Barron was

guilty of contributory negligence as a matter of law, and rendered judgment for the company. A writ of error was prosecuted to this court, and the opinion rendered by Judge Powell. This court reversed the judgments of the District Court and Court of Civil Appeals, and remanded the case to the District Court for another trial, disagreeing with the majority of the Court of Civil Appeals that Barron was guilty of contributory negligence as a matter of law. In the opinion, Judge Powell said:

"But although we differ with the majority of the Court of Civil Appeals in its judgment as to the effect of the evidence in this case upon the issue of contributory negligence of Barron, we cannot set aside its reversal of this case and affirm the judgment of the trial court. The Court of Civil Appeals has held that under the undisputed facts in this case, as it construes them, Barron was guilty of contributory negligence as a matter of law. It will be assumed, ordinarily, that this holding includes the lesser holding that a jury verdict upon the same evidence, acquitting Barron of contributory negligence, would be held by the same Court of Civil Appeals to be against the weight of the evi- [fol. 440] dence. See Lee vs. Railway Co., 89 Texas, 583, 36 S. W. 63; Choate vs. Ry. Co., 91 Texas, 406, 44 S. W. 69; Lilienthal vs. Indemnity Exchange, (Tex. Com. App.), 239 S. W. 906. Assuming that the Court of Civil Appeals would also have held that *the Court of Civil Appeals would also have held that* the verdict on contributory negligence was against the weight of the testimony, the Supreme Court can only remand the case, for the Court of Civil Appeals can reverse and remand the case on the fact as being against the weight of the evidence, and such a reversal is binding upon the Supreme Court."

In approving the judgment of the Commission of Appeals in the above case, the Supreme Court not only approved the judgment rendered, but approved "the holding of the Commission of appeals on the question discussed in its opinion."

The case of Chapman vs. Kellogg, 252 S. W. 151, was an action of trespass to try title. The cause was submitted to the jury upon special issues, and upon the findings of the jury in response thereto, the trial court rendered judgment

in favor of Chapman for the land in controversy. Upon appeal to the Court of Civil Appeals, the judgment of the trial court was reversed, and judgment rendered in favor of the Kellogs for the land in suit.

On writ of error to this court, Judge Powell, who rendered the opinion said:

"We think, as already stated, that the findings of the jury have considerable basis in the record, and we cannot recommend an affirmance of the judgment of the Court of Civil Appeals. On the other hand, we cannot recommend an affirmance of the trial court's judgment. The finding that there is no evidence in the record to sustain the trial court's judgment, ordinarily includes the lesser finding that said judgment is against the weight of the evidence, and that the same court would have remanded the case, because of the insufficiency of the evidence, if that had been necessary. Such a remand is binding upon the Supreme Court, but in this case, the Court of Civil Appeals not only finds that there is no evidence to support the jury's findings, but also that there is not sufficient support in the evidence for the judgment rendered by the trial court. A careful [fol. 441] reading of the opinion of the Court of Civil Appeals leaves no doubt but that said court would have remanded the case, because the judgment was against the weight of the testimony, if given an opportunity to do so. Therefore, the Supreme Court can only remand the case to the trial court for another trial, even though it would be inclined to affirm the judgment of the trial court if it had jurisdiction over all fact questions. We passed upon a similar question some two months ago, in the case of Barron vs. Railway Company, (Tex. Com. App.) 249 S. W. 825. In that case, we cited the following authorities: Lee vs. Ry. Co., 89 Texas, 583, 36 S. W. 63; Choate vs. Ry. Co., 91 Tex. 406, 44 S. W. 69; Lilienthal vs. Indemnity Exchange, (Tex. Com. App.) 241 S. W. 682; Brown vs. City Service Company, (Tex. Com. App.), 245 S. W. 656.

In Rodgers & Adams vs. Lancaster, 248 S. W., 669, the plaintiffs sued for recovery of damages to a car load of mules, and recovered a judgment in the trial court, the cause being submitted on special issues. The Court of Civil Appeals affirmed the judgment in favor of the Panhandle &

Santa Fe Railway Company, and reversed the judgment against Lancaster & Wallace, the Receivers, and remanded the cause for another trial on the issues between them and the plaintiffs. It appears that proof of the market value of the mules was furnished by Rodgers, one of the plaintiffs, and the Court of Civil Appeals held that he was incompetent to testify to such facts. This court disagreed with that conclusion of the Court of Civil Appeals, and in the course of the opinion rendered by Judge Gallagher, said:

"We are asked to recommend that the judgment of the Court of Civil Appeals, reversing the judgment of the trial court, and remanding the cause, be set aside, and that the judgment of the trial court be affirmed. The Court of Civil Appeals, because of the supposed lack of qualification of the witness, Rodgers, to testify concerning the market value of the mules, held that the verdict and judgment of the trial court were without support in the evidence, and reversed and remanded the case. The exact issue raised by request was before Section 'B' of this Commission in the case of Lilienthal vs. Motor Company Indemnity Exchange, (Tex. Com. App.), 239 S. W. 906, 97, 98, and Judge Powell, for that court, clearly and aptly [fol. 442] stated the law controlling the issues raised thereby as follows:

" 'Although we think the Court of Civil Appeals erred in holding that there was no evidence identifying the car in question, we think the Supreme Court is without authority to affirm the judgment of the trial court. The Court of Civil Appeals did not enter final judgment rendering the case for the Indemnity Company, but remanded it for another trial upon the facts. Their finding *that there was no evidence in the record to sustain the judgment of the trial court, will be assumed to include a further and lesser finding that the judgment of the trial court was against the weight of the testimony.* The latter finding would have authorized a remanding of the cause by the Court of Civil Appeals. A remanding, for that reason, will be binding upon the Supreme Court, involving purely a question of fact. The rules of law in that connection, which were followed here, have been stated by our Supreme Court in an

opinion by Chief Justice Phillips, in the case of Tweed vs. W. U. Tel. Co., 107 Texas, 247, 255; 166 S. W. 696, 177 S. W. 957. Under that authority and others it cites, we must respect the remanding of this case by the Court of Civil Appeals, and recommend that its action in that connection be affirmed.' (Italics ours.)

"We, therefore, recommend that the judgment of the Court of Civil Appeals, reversing the judgment of the trial court and remanding the cause to the District Court, be affirmed, but that the court, on another trial, be governed by this opinion on the issues herein discussed."

In Tweed vs. Western Union Telegraph Company, refering to Judge Phillips' opinion, 177 S. W. 957, the plaintiff, Tweed, sued the defendant to recover damages for personal injuries. Among other defenses, was interposed the defense that he was guilty of contributory negligence.

Tweed recovered judgment in the trial court. This judgment was reversed and remanded by the Court of Civil Appeals of the Fifth District.

In the opinion of Judge Phillips above referred to, the statement is made that the effect of the opinion of the Court of Civil Appeals, as construed by this court, was a holding by the Court of Civil Appeals that the plaintiff below, according to the undisputed proof, was guilty of contributory negligence as a matter of law. In the latter part [fol. 443] of the opinion referred to, Judge Phillips used the following language:

"An extended printed argument has been filed in this case by counsel for the plaintiff in error, urging that we ought to render judgment in his favor because of our not having sustained the conclusion of the Court of Civil Appeals that Tweed was guilty of contributory negligence as a matter of law, the jury having resolved that issue in favor of the plaintiff; but in view of these adjudications, as well as the explicit opinion of Judge Gaines in Choate vs. Railway Company, 91 Texas, 406, 44 S. W. 69, we find some difficulty in understanding how any misapprehension could have arisen upon this question. With the Court of Civil Appeals invested with the full power of determining the facts of the case, and setting aside the verdict of the jury on the facts, it must be assumed, as is said in the opin-

ions quoted, that in reaching a conclusion that the evidence showed *as a matter of law* that the plaintiff was not entitled to recover, and for that reason, ordering that the case be remanded, in the same case it would have held that the verdict was against the weight of the evidence. *With a case thus remanded under the judgment of the Court of Civil Appeals, it would amount to a denial of its authority to determine the facts and set aside a verdict on the evidence, for this court to assume the power of rendering the judgment because it differed with the conclusion reached by that court upon the effect of the evidence.* (Italics ours.)

"Beck vs. Texas Company, 105 Texas, 305, 148 S. W. 295, furnishes no analogy. The distinction between that case and this one is manifest. There, the Court of Civil Appeals did not exercise the authority it possessed to set aside the verdict on the facts and remand the cause. It rendered judgment in favor of the defendant on the facts; and in doing so, made no finding of fact which would defeat recovery. In differing from the Court of Civil Appeals upon the question of law as to the effect of the evidence, we were authorized to affirm the judgment of the lower court, since the Court of Civil Appeals had not sought to exercise its province of determining the facts and *ordering the case remanded for another trial*, because of its difference with the jury on the facts, and in affirming the judgment, we therefore in no wise trenched upon its authority. *Had the Court of Civil Appeals there remanded the case instead of rendering judgment, we would have been compelled to respect its judgment to that extent, and could not have affirmed the trial court judgment.*" (Italics ours.)

[fol. 444] Finally, we submit that the decision of any issue of negligence vel non is, of necessity, a decision primarily of a question of fact. Any negligence amounting to negligence per se, or negligence as a matter of law, must of very necessity, be established by facts, and such a decision embraces primarily a decision as to the facts alleged to constitute the negligence, of whatever character or grade it may be denominated.

Mr. S. P. Jones, whose residence is Marshall, Texas, is attorney of record for the plaintiff in error in this cause, and it is prayed that he be served with notice of this mo-

tion, as required by law; and that the motion be granted, and that the judgment of the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas, reversing the judgment of the District Court of Bowie County, Texas, and remanding this cause to that court for a new trial be affirmed, all of which is respectfully prayed.

King, Mahaffey & Wheeler, Attorneys for Defendant in Error.

Endorsed: Mo. No. 7510. In the Supreme Court of Texas, (Before Commission "B"). Franklin Jones, Administrator of the Estate of D. R. Ferguson, Deceased, Plaintiff in error, vs. Kansas City Southern Railway Co., Defendant in error. Motion of defendant in error, Kansas City Southern Railway Company, for a rehearing. King, Mahaffey & Wheeler, Attorneys for Defendant in error. Filed in Supreme Court Mch. 9, 1927, F. T. Connerly, Clerk. Service Accepted. Submit Apl. 6, 1927. Referred to Sec. "B" Com. of Appeals. Apl. 20, 1927, Overruled.

[fol. 445] In the Supreme Court of Texas (Before Commission "B")

[Title omitted]

Waiver of Service and Time of Motion to Withdraw from Commission of Appeals and Motion for Rehearing—Filed March 29, 1927

To the Honorable Supreme Court of Texas:

Now comes, Franklin Jones, Administrator of the estate of D. R. Ferguson, deceased, and accepts service of the motion of defendant in error to have this case withdrawn from the Commission of Appeals, and for a rehearing in said cause, and waives further time, and agrees that the said motion, together with the answer of the plaintiff in error thereto, may be at once submitted and considered.

Jones & Jones, Attorneys for Plaintiff in Error.

[File endorsement omitted.]

[fol. 446] In Supreme Court of Texas (Before Commission "B")

[Title omitted]

Motion to Withdraw Cause from Commission of Appeals—Filed March 9, 1927

To the Honorable Supreme Court of Texas:

Now comes the Kansas City Southern Railway Company, defendant in error in the above styled and numbered cause, and shows to the court that said cause is pending in this court on a writ of error issued by this court to the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas.

The cause was instituted by the Administrator of the Estate of D. R. Ferguson, deceased, under the provisions of the Federal Employers' Liability Act, to recover damages on account of the death of said deceased. The suit was instituted in the District Court of Bowie County, Texas.

The plaintiff in error alleged that the death of said D. R. Ferguson, deceased, who at the time of his death was employed by the defendant in error as a car inspector in its yard at Leesville, Louisiana, was caused by negligence on the part of defendant in error, the deceased having been killed by being struck by a regular passenger train of defendant in error running North on its main line track [fol. 447] through the town of Leesville, Louisiana.

The defendant in error, as a defense, interposed a general denial, plea of assumed risk, and plea that the deceased was guilty of contributory negligence causing and contributing to cause his death.

The cause was tried in the District Court of Bowie County, before a jury, and was submitted on special issues. The jury found that the defendant in error was guilty of all the acts of negligence alleged against it by the plaintiff in error, and that the deceased did not assume the risk of being struck by the train, and that he was not guilty of contributory negligence causing, or contributing to cause his death. A judgment in accordance with the findings of the jury was rendered in favor of the plaintiff in error

against defendant in error, for Thirteen Thousand Five Hundred Dollars ($13,500.00).

The defendant in error prosecuted an appeal from such judgment to the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas, assigning as error, among others, that the finding of the jury that deceased was not guilty of contributory negligence, was unsupported by the evidence, and contrary to the evidence.

On the appeal, the said Court of Civil Appeals first reversed the judgment of the trial court and remanded the cause to the District Court of Bowie County, Texas, on the ground that the deceased was shown by the evidence to be guilty of contributory negligence proximately causing, or aiding in causing his death. Afterwards, the plaintiff in error filed a motion for a rehearing, and on that rehearing, the Court of Civil Appeals affirmed the judgment of the [fol. 448] trial court. The defendant in error then filed its motion for a rehearing, and the Court of Civil Appeals, on that rehearing, by a majority opinion, declared that its first decision rendered in the cause, reversing and remanding the cause was correct, and returned to that opinion, and reversed the judgment of the District Court of Bowie County, and ordered the cause remanded for a new trial.

From this judgment of the majority, Judge Wilson, of the Court of Civil Appeals, dissented. The plaintiff in error then filed a motion for a rehearing, which was overruled.

The opinions of the Court of Civil Appeals rendered in this cause, are reported, the first two in Volume 282, page 309, of the Southwestern Reporter, and the last, or majority, and dissenting opinion, are reported in Volume 287, page 304, of the Southwestern Reporter.

On application to this court by the plaintiff in error, a writ of error was granted, and the cause has been referred to Section "B," of the Commission of Appeals, by this court.

Heretofore, on February 23, 1927, Section "B," of the Commission of Appeals, rendered its decision in this cause, which was approved by this court and adopted as its opinion, reversing the judgment so rendered by the said Court of Civil Appeals, and affirming the judgment of the trial court, holding that the finding of the majority of the

Court of Civil Appeals, that deceased was guilty of contributory negligence, proximately contributing to cause his death, was the decision of a question of law, and in effect, that its judgment and decision remanding the cause to the District Court of Bowie County for another trial, should be disregarded.

The defendant in error, in due time, has filed its motion for a rehearing of this cause by this court, and the cause is now pending in this court on its motion for a rehearing.

[fol. 449] The defendant in error conceives that the judgment and opinion of Section "B," of the Commission of Appeals is erroneous, and amounts to a disregard or misconstruction of the provisions of Section 6, of Article 5 of the Constitution of Texas, and the provisions of Article 1820, of the Revised Statutes (1925) of Texas; and further, that such decision is contrary to an unbroken line of decisions by this court, including the following decisions, to-wit: Marshburn et al. vs. Stewart et al., 260 S. W. 565; Mason vs. Peterson, 250 S. W. 142; Brown vs. City Service Co., 245 S. W., 656; Electric Express & Baggage Co. vs. Ablon, 218 S. W. 1030; Barron vs. H. E. & W. T. Ry. Co., 249 S. W. 825; Chapman vs. Kellogg, 252 S. W. 151; Rodgers & Adams vs. Lancaster, 248 S. W. 660; Tweed vs. W. U. Tel. Co., 177 S. W. 957; Southern Cotton Oil Co. vs. Wallace, 38 S. W. 1137; Pollock vs. H. & T. C. R. R. Co., 103 Texas, 69; Lee vs. I. & G. N. Ry. Co., 89 Texas, 583.

In view of the importance of the question involved, and inasmuch as in the view of the defendant in error in this cause, the decisions rendered herein by Section "B," of the Commission of Appeals, overrules the decisions rendered in all the cases hereinabove noted, and places a construction upon the section of the Constitution and Article of the Statute above referred to, contrary to the construction previously placed on them by this court, the defendant in error here now respectfully prays that this court withdraw said cause from said Commission, and itself consider and decide such motion for a rehearing.

Respectfully submitted.

King, Mahaffey & Wheeler, Attorneys for Defendant in Error, Kansas City Southern Railway Co.

[fol. 450] [File endorsement omitted.]

IN THE SUPREME COURT OF TEXAS (BEFORE COMMISSION "B")

[Title omitted]

REPLY TO MOTION TO WITHDRAW—Filed March 29, 1927

To the Honorable Supreme Court of Texas:

The plaintiff in error here presents his reply to the motion to withdraw from commission of appeals, and requests that the same also be considered as a reply to the motion of defendant in error for a rehearing of this cause. The case is readily and easily distinguishable from the authorities relied upon by the defendant in error, and when fully con-[fol. 451] sidered, the contentions of the defendant in error, both as to its motion to withdraw from the commission of appeals, and as to the motion for a rehearing of the cause, are wholly without merit.

The court of civil appeals clearly misunderstood, and therefore misapplied the law of the case, and held that under its misconceptions or misunderstanding of the law, it was forced to remand the case, because under the mistaken view of the law entertained by that court, it was necessary for some amount to be deducted on account of the contributory negligence of the deceased, and the amount to be so deducted, *if is* was correct as to the law,—was a question of fact for a jury; and it apologetically remanded the case for that reason,—clearly holding in the original opinion that there was no other issue of fact that it thought should be further passed upon by a jury.

This clear cut announcement was emphasized by that court unanimously affirming the case on rehearing, when it really understood the law applicable to the facts of the case, on the issue of contributory negligence.

No apprisal of facts was made or considered by the court of civil appeals in reversing this cause, and on the contrary, it clearly appears that said court not only refrained from reversing the case on any question or questions of fact, but rather apologized for the necessity, as that court viewed it, of having to refer the case back to the trial court, on account of the conclusion that the court of civil appeals reached with reference to the law of the case. The writer feels that the correctness of the disposition made of this case in the opinion written by Mr. Justice Speer, can

hardly be emphasized by anything that can now be said. [fol. 452] We are confronted with a case that has been pending for five years, in which the court of civil appeals has misconstrued the law on one point, and as a result of that misconstruction of the law, rather grudgingly admitted it was necessary to remand the case, because it could not determine the facts as to the amount of excess of the verdict, which such misconstruction of the law by it, made it necessary to be determined in order that a judgment could be rendered in accordance with its misconstruction of the law.

At one time after it had so miscon-trued the law in the original opinion, it, after due reconsideration reached a conclusion that correctly reflected the law, and as pointed out by Mr. Justice Speer, it then said that both the plaintiff in error, and defendant in error challenged its conclusion of law, based upon an erroneous construction of the facts, and it readily granted a rehearing and affirmed the judgment of the trial court, thereby emphasizing that it was entirely satisfied with the jury's disposal of the issues of fact. It is true that after having thus affirmed the case, it granted the motion of defendant in error for a rehearing, and reversed the case, but in doing so, it went back to its original misunderstanding of the law, and did not appraise or attempt to appraise the facts in any way, and did not use any language that remotely indicated that it would reverse the case on account of the finding of the jury on the question of contributory negligence being contrary to the preponderance of the evidence. In fact, it clearly emphasized that its reversal was based solely upon what turned out to be a misconception of the law of the case.

Under such conditions, it would be wrong in fact, as well as in principle, for this case to be referred back to the trial court,—merely because the court of civil appeals had applied a rule that was contrary to the established law of [fol. 453] the land,—in fact had incorrectly declared the law to be the direct opposite of what it in fact is.

It will be observed by an examination of the cases relied upon by the defendant in error, that in those apparently favorable to its contention that a holding that there was no evidence, means that the court would hold that the evidence was insufficient, that no language was used by the

court of civil appeals indicating that its remand of the case was based solely upon its erroneous construction or understanding of the law. In fact, it will be found that usually in such cases, the discussion was such as to indicate if not to clearly show that the Court of Civil Appeals would have held that the finding of the trial court was against the preponderance of the evidence, and that the evidence was insufficient to sustain the verdict. Thus, in the case of Marshburn et al. vs. Stewart et al., 260 S. W. 565, the Supreme Court clearly held that it was reversing the case because it came within the rule "that in a case remanded by the court of civil appeals for a new trial on the facts, its finding of no evidence, though one of law, must be held in the absence of *contrary language* (italics ours) to include the finding of insufficient evidence, though one of fact."

The present case is an illustration of the distinction thus made, in that it is not "indicated" but clearly stated by the court of civil appeals in remanding this case, that it was solely by reason of its misconception of the law, applicable to the facts, and not its appraisal of the facts.

We do not feel that it is necessary to review all the laws, but an examination thereof will clearly disclose, that where the court of civil appeals has remanded a case, and the Supreme Court, disagreeing with its pronouncement of the [fol. 454] law, has sent the case back to the trial court, that it was because the court of civil appeals had held that it would remand the case to the trial court because it considered the evidence insufficient to sustain the judgment, in the light of the law, if it had not misconstrued the same.

It is very clear that the Supreme Court, disagreeing with the Court of Civil Appeals in a remanded case, must in remanding to the trial court, do so because it appears from the opinion of the Court of Civil Appeals that it has held that it would reverse the case because the finding of the trial court was against the preponderance of the evidence. It is true that in some cases (with which we disagree) it has been held that in the particular case where the court of civil appeals could have reversed and rendered the case upon its view of the law, but remanded same, in the absence of language used by that court showing the contrary, this court will presume it was held by the court of civil appeals that it would remand the case because of the finding of the

trial court being against the preponderance of the evidence. But in no case has the Supreme Court held that where it appears from the opinion of the Court of Civil Appeals, that it would not have reversed and remanded, but would have affirmed the judgment of the trial court, had it known or correctly applied the law, that the Supreme Court must remand the case to the trial court.

The law is not supposed to be, nor should it be construed to be an impractical science, but it occurs to us that if this court should now adopt the policy of remanding to the trial court a case in which it holds that the court of civil appeals has misunderstood and misapplied the law, but in doing so has clearly held that if it had understood and applied the [fol. 455] law as subsequently announced by the Supreme Court, that it would have affirmed the judgment, and not have reversed and remanded the case to the trial court, it would in effect announce a policy of useless and unnecessary delay in the final disposition of a civil case, which it can not be conceived that this court would subscribe to, in the absence of some constitutional, or statutory provision, positively requiring it to participate in such unnecessary prolongation of litigation. There is clearly no constitutional or statutory provision requiring this court to now embark upon any such policy of encouraging delays. This case must appeal to this court as a very strong one in favor of this court exercising its powers to the end, and not delay the final disposition of the case, for in this case it appears not from silence or inference, but from the open full, clear cut declaration of the court of civil appeals, that had it known the law to be what it is, it would have affirmed the case, and not have reversed and remanded it.

It is very clearly indicated, if not expressly declared by the court of civil appeals in the original opinion that it reluctantly remanded the case by reason of its misconception of the law, and that it would not have remanded the case but for the fact that it concluded that the law placed upon the deceased the burden of being guilty of contributory negligence; then when it granted the plaintiff in error a rehearing, and considered and disposed of the case in the light of the law as it then interpreted the same, and which is clearly the correct interpretation, it very promptly by a unanimous opinion affirmed the judgment of the trial court, [fol. 456] expressing its entire satisfaction with the find-

ings of the jury acquitting the deceased of contributory negligence. When it granted the motion for rehearing on behalf of the defendant in error, and again reversed and remanded the case, it was solely upon its misconception of the law, and it went back to its original opinion reversing and remanding solely because by reason of its misunderstanding of the law, it concluded the deceased had been guilty of contributory negligence as a matter of law, which required a jury to pass upon the amount of damages that should be deducted by reason of such contributory negligence. The conclusion can not be escaped that this court is being requested by the defendant in error to remand a case to the trial court simply because the court of civil appeals reversed and remanded the case to the trial court on an erroneous view of the law, but for which error in misconstruing the law, the court of civil appeals has expressly and definitely declared and decided that the case should be affirmed. It is confidently believed that this court would really not have the right to correctly declare the law in such a case, and yet remand the case to the trial court for a new trial. It is absolutely certain that nothing in the law requires this court to remand such a case to the trial court for a trial de novo, and surely under such circumstances, that is in a case where it so clearly and definitely appears that this court is not required to remand the case to the trial court, and in which the court of civil appeals has so definitely and certainly decided and held, that had it known and appreciated the law which should have been applied to the case, that it would have affirmed the judgment of the trial court, this court will not remand the case.

[fol. 457] The effect of a judgment by this court remanding this case to the trial court, would be to hold, and decide, that the direct and express findings of fact, or passing upon the sufficiency of the evidence by the court of civil appeals in determining issues of fact, are not final—yea even worse, that this court must not only hold that they are not final, but must disregard the same, and remand the case to the trial court, which, had the court of civil appeals appreciated and understood the law, it has clearly announced, it would have affirmed, instead of remanding to the trial court.

Bearing in mind that the Supreme Court reversing the Court of Civil Appeals will remand to the trial court only

those cases in which the Court of Civil Appeals has remanded the case on a question of fact, it seems clear that in this case, where the Court of Civil Appeals has clearly held that if it had correctly understood the law, it would not have reversed and remanded, but would have affirmed the judgment of the trial court, that the Supreme Court should affirm the judgment of the trial court.

We respectfully, but earnestly insist that the Commission of Appeals has correctly disposed of the case, and we pray that the motion for rehearing be denied.

Jones & Jones, Attorneys for Plaintiff in Error.

[File endorsement omitted.]

[fol. 458] In Supreme Court of Texas

[Title omitted]

Minute Entry of Order Overruling Motion to Withdraw—April 6, 1927

To withdraw case from Com. of Appeals—Overruled.

In Supreme Court of Texas

[Title omitted]

Minute Entry of Order Overruling Motion for Rehearing—April 20, 1927

It is ordered by the court that the motion for rehearing herein by the deft. in error be overruled, as recommended by the Commission of Appeals.

[fol. 459] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. —. Texas Supreme Court. Term No. —. The Kansas City Southern Railway Company, petitioner, vs. Franklin Jones, administrator of the estate of D. R. Ferguson, deceased. Petition for writ of certiorari and exhibit thereto. Filed July —, 1927. File No. —.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 24, 1927

The petition herein for a writ of certiorari to the Supreme Court of the State of Texas is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.
FILED
JUL 5 1977
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 849

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Petitioner,

v.

FRANKLIN JONES, Administrator of the Estate of D. B. Ferguson, Deceased.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF

FRANK H. MOORE,
J. J. KING,
J. Q. MEHAFFEY,
A. F. SMITH,
Counsel for Petitioner.

(32,801)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 349

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

v.

FRANKLIN JONES, ADMINISTRATOR OF THE ESTATE OF D. R. FERGUSON, DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS.

Your petitioner, The Kansas City Southern Railway Company, respectfully petitions this Court to grant a writ of certiorari to the Supreme Court of Texas, and to remove therefrom to this Court for review the record of the case therein lately pending, of Franklin Jones, Administrator of the Estate of D. R. Ferguson, deceased, plaintiff in error, *v.* The Kansas City Southern Railway Company, defendant in error, being case

No. 762-4730 on the docket of that court (Franklin Jones, Admr., *v.* Kansas City Southern Railway Company, 291 S. W., 528). A certified copy of the record therein is presented herewith.

Review by writ of certiorari is prayed for on the ground that your petitioner specially set up and claimed throughout in this cause rights and immunities under the Federal Employers' Liability Act, to-wit: (1) of the lack of any negligence on the part of petitioner proximately causing the death of decedent; (2) of the negligence of the deceased at the time of the injury, which wholly or partly resulted in his death; and (3) of assumed risk (see Kansas City Southern Railway Company *v.* Jnes, 282 S. W., 312, Rec., 186, 188); which rights and immunities were denied your petitioner by the Supreme Court of Texas in that said court on to-wit: February 23, 1927 (Rec., 326, 328), reversed the judgment of the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas, which had reversed a judgment for $13,000 against your petitioner rendered by the District Court of Bowie County, Tex., and affirmed said judgment of the district court, and on, to-wit, April 20, 1927, overruled your petitioner's motion for a rehearing (Rec., 352). In the judgment of said Supreme Court of Texas (which is the court of last resort in Texas), in this cause, said Supreme Court of Texas failed to decide the same in accordance with the applicable principles of law as the same had been determined by the Federal courts, but, on the contrary, applied interpretations of

such principles of law which were in conflict with the decisions of the Federal courts.

Respondent's action is based on the Federal Employers' Liability Act (Rec., 1, 2), and your petitioner asserted in said cause in the district court (Rec., 8 *et seq.*), and throughout the cause the defenses of contributory negligence and assumption of risk, as found by said court of appeals (Rec., 181).

For the sake of brevity the respondent will hereinafter be designated as the "plaintiff," your petitioner as the "defendant," and D. R. Ferguson as the "decedent."

Decedent being then employed as a car inspector in defendant's service, in assisting in making up, on defendant's passing track, a northbound train carrying freight in interstate commerce (Rec., 87), was killed, presumably by a northbound passenger train on defendant's main line track.

Plaintiff (or his predecessor as administrator), sued defendant, an interstate carrier, in the District Court of Bowie County, Tex., to recover damages, under the Federal Employers' Liability Act, for the death of decedent, D. R. Ferguson, an employee of defendant, plaintiff contending that his death was due to his being struck by defendant's passenger train negligently operated. On, to-wit, November 20, 1924 (Rec., 36), a jury returned a special verdict finding defendant guilty of negligence in failing to give warning of the approaching train by bell or whistle, in running the train at an unusually rapid rate of speed, and in failing to dim the headlight on the engine, and that the

light "caused the said D. R. Ferguson to be blinded" (Rec., 38). The jury also found that Ferguson was not negligent, and that his children were damaged by his death in the sum of $13,000, on which verdict judgment was thereupon entered against defendant for that sum (Rec., 37). Defendant duly filed its motion for a new trial (Rec., 41), which was overruled (Rec., 56). It duly appealed from said judgment (Rec., 58) to the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas (hereinafter called the court of appeals), the court having appellate jurisdiction in said cause (Article 1591, Compiled Statutes of Texas, 1920). Said court of appeals found that none of the alleged negligent acts or omissions of the defendant were the efficient cause of the death of decedent, except the alleged failure to ring the engine bell on the approaching passenger train, the court finding that there was evidence that the engine bells were customarily rung on defendant's trains going through Leesville, and that the bell on this engine was not rung. The court further found, however, that decedent was guilty of negligence proximately contributing to his death in that he knew when he assumed his position near the main line track that the passenger train was likely to pass (Rec., 187-188); that he had no duties to perform at that time on the main line track (Rec., 188); that the rattle and roar of the approaching train were plainly audible (Rec., 188); that the evening (Sunday) was quiet (Rec., 185); that the track was straight (Rec., 184) (this straight track extending over a mile (Rec., 79, 91, 129, 131); that the en-

gine's headlight cast a bright light 700 or 800 feet ahead (Rec., 190); that these facts gave decedent ample opportunity to acquaint himself with the peril incident to the situation which led to his being injured (Rec., 190); that decedent was 62 years old, with 12 years' experience in this yard (Rec., 181); that "there is really nothing to explain such conduct or excuse the failure to use due care to leave the position of peril incident to the situation near the main line. He could not have been in a better position to hear the approaching train" or see the approaching light (Rec., 184, 190). The court therefore held that as decedent was guilty of contributory negligence, the jury, in accordance with the provisions of the Federal Employers' Liability Act, should have taken this fact into consideration in fixing the amount of damages, and as it had found decedent was not negligent and therefore had not taken such negligence into consideration, the case must be reversed and remanded. The essential facts upon which the court of appeals made its finding that decedent was guilty of negligence proximately contributing to his death are not in dispute. It also appears that under the statutes of Texas, "the judgments of the courts of appeal shall be conclusive on the law and the fact" (Complete Texas Statutes, 1920, Article 1591).

As we have already shown, the Supreme Court of Texas reversed the judgment of the court of appeals, and affirmed the judgment of the district court, erroneously failing to apply, on the facts thus found by the court of appeals, in a case arising under a Federal

statute, the rule established by the Federal courts, that decedent, on such facts, was negligent as a matter of law, and erroneously applying the rule established by the Texas courts, that on the facts as stated by the court of appeals the question of whether or not decedent was negligent was a question of fact for the jury. This ruling of the Supreme Court of Texas presents the principal question involved in this case.

After the original decision of said court of appeals, reversing said judgment of said District Court of Bowie County, a motion for a rehearing was filed (Rec., 193). On the rehearing the court of appeals reversed its original decision, on to wit: March 18, 1926 (Rec., 237), and held that the question of decedent's contributory negligence was one for the jury (Rec., 239-240), although, it is said, "in view of the rattling noise of the train and the glare of the headlight on the engine, in connection with the fact that deceased knew that the train was about due, it is difficult to impute to him utter ignorance of the approaching train." The court failed to rule that the finding of the jury that the glare of the headlight had "blinded decedent" was a finding that he actually knew of the approach of the train.

Thereafter defendant filed another motion for a rehearing (Rec., 241), and on that rehearing the court, in a majority opinion, on to wit: June 24, 1926, held (Rec., 244 *et seq.*) that "after an extended consideration of the record, it is believed by a majority of this Court that the original disposition of this case should

be adhered to" (Kansas City Southern Railway Co. *v.* Jones, 287 S. W., 304).

Thereafter plaintiff filed another motion for a rehearing (Rec., 249), and on to wit: October 7, 1926 (Rec., 275), the court overruled said motion (Kansas City Southern Railway Co. *v.* Jones, Administrator, 287 S. W., 304).

Thereafter said cause was taken by plaintiff on writ of error (Rec., 275 *et seq.*), to the Supreme Court of Texas, which court then had jurisdiction of said cause (Article 1521, Compiled Texas Statutes, 1920). Said Supreme Court, on, to wit: February 23, 1927 (Rec., 325 *et seq*), as above indicated, reversed the judgment of the court of appeals, on the ground (Rec., 326) that the trial court had found that the conduct of the decedent was not negligent, and that the court of appeals, through its majority, therefore erred in holding that it was. The supreme court thereupon affirmed the judgment of the district court (Jones *v.* Kansas City Southern Railway Co., 291 S. W., 528).

In due time defendant, your petitioner, filed in said Supreme Court its motion for a rehearing (Rec., 329), which motion was by said court denied on to wit: April 20, 1927 (Rec., 352); and your petitioner now makes application to this Court for a writ of certiorari to the Supreme Court of Texas. Your petitioner further says that by consent of counsel for said respondent the mandate in said cause is to be stayed until your petitioner can make application for this writ of certiorari.

Your petitioner respectfully says that the Supreme Court of Texas was in error in reversing the holding

of the court of appeals that the negligence of D. R. Ferguson was a proximate cause of his own death, and in affirming the judgment of the district court, and in not reversing the same.

Errors of the Supreme Court of Texas.

Your petitioner respectfully states that in the judgment and decision of the Supreme Court of Texas, upon the questions involved and hereinbefore referred to, petitioner was denied rights and immunities claimed by it under the Federal Employers' Liability Act, through certain rulings which are erroneous and in conflict with the decisions of this Court, and with the decisions of other courts of the United States, in the following particulars, to wit:

1. The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to hold that D. R. Ferguson was guilty of negligence directly contributing to his death. (Frese *v.* Chicago, etc. Co., 263 U. S. 1; Chesapeake, etc. Co. *v.* Nixon, 271 U. S. 218; Blunt *v.* Pennsylvania, etc. Co., 9 Fed. (2d) 395; Aerkfetz *v.* Humphreys, 145 U. S. 418; Elliott *v.* Chicago, etc. Co., 150 U. S. 245; Erie, etc. Co. *v.* Kane, 55 C. C. A. 129, 118 Fed. 223, 234; Pheasant *v.* Director General, 285 Fed. 342; Frazier *v.* Interstate, etc. Co., 273 Fed. 181 (certiorari denied, 256 U. S. 703); Miller *v.* Canadian, etc. Co., 281 Fed., 664; Chicago, etc. Co. *v.* Houston, 95 U. S., 697; Northern, etc Co. *v.* Freeman, 174 U. S., 379; Dernberger *v.* Baltimore, etc. Co., 155 C. C. A., 551, 243 Fed., 21; Payne *v.* Blevins,

280 Fed., 310; Atchison, etc. Co. *v.* McNulty, 285 Fed., 97 (certiorari denied, 262 U. S., 746); Bradley *v.* Missouri, etc. Co., 288 Fed., 484; Bush *v.* Baltimore, etc. Co., 288 Fed., 845; Parramore *v.* Denver, etc. Co., 5 Fed. (2d), 912, 913; Atlantic, etc. Co. *v.* McLeod, 11 Fed. (2d), 22; Allen *v.* New York, etc. Co., 98 C. C. A., 253, 174 Fed., 774; Louisville, etc. Co. *v.* Woodward, 99 C. C. A., 479, 176 Fed., 5; Garlich *v.* Northern Pac. Ry. Co., 67 C. C. A., 237, 137 Fed., 837, 841; Chicago, etc. Co. *v.* Andrews, 64 C. C. A., 399, 130 Fed., 65; Tomlinson *v.* Chicago, etc. Co., 67 C. C. A., 217, 134 Fed., 233, and Rollins *v.* Chicago, etc. Co., 71 C. C. A., 615, 139 Fed., 639.)

2. The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to hold that D. R. Ferguson was guilty of negligence which was the sole proximate cause of his death. (District of Columbia *v.* Moulton, 182 U. S., 576, 581; Craine *v.* Metropolitan, etc. Co., 246 Mo., 393; Goldberg *v.* Chesapeake, etc. Co., 211 Ky., 115.)

3. The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to hold that the death of D. R. Ferguson was the result of risks assumed by him. (Chesapeake, etc. Co. *v.* Nixon, 271 U. S., 218; Southern, etc Co. *v.* Berkshire, 254 U. S., 413; Atchison, etc. Co., *v.* Weyer, 8 Fed. (2d), 30; New York, etc. Co. *v.* McDougall, 15 Fed. (2d), 283.)

4. The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in fail-

ing to reverse outright the judgment of the District Court of Bowie County, Texas. (See the authorities hereinbefore cited.)

5. The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in reversing the judgment of the Court of Civil Appeals of the Sixth Supreme Judicial District of Texas. (See the authorities hereinbefore cited.)

6. The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to follow the rules of law established by the Federal courts in construing the Federal Employers' Liability Act. (Chicago, etc., Ry. Co. *v.* Coogan, 271 U. S., 472; Pryor *v.* Williams, 254 U. S., 43.)

Your petitioner respectfully shows that the question of liability in this cause is governed by the statutes of the United States, and the decisions of this Court and other United States courts construing the same, and that the decision of the Supreme Court of Texas is in conflict with the decisions of this Honorable Court and with the decisions of other Federal courts, and that said decision of said Supreme Court of Texas should be corrected by this Honorable Court, in order that the same may conform with settled jurisprudence as fixed and established from time to time by this Honorable Court and other United States courts, all of which is fully set forth in the brief and argument in support hereof, which is attached hereto and filed herewith.

WHEREFORE your petitioner prays that a writ of certiorari be issued under the seal of this Honorable Court, directed to the said Supreme Court of the State of Texas, sitting at Austin, Texas, commanding the said court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record of the proceedings of said Supreme Court had in this cause, to the end that the said cause may be reviewed and determined by this Honorable Court, as provided by law, and that said judgment of the said Supreme Court of the State of Texas be reviewed by this Honorable Court, and for such other relief as may seem proper, and for all of which your petitioner will ever pray.

FRANK H. MOORE,
J. J. KING,
J. Q. MEHAFFEY,
A. F. SMITH,
Attorneys for Petitioner.

STATE OF TEXAS,
County of Bowie, ss:

Frank H. Moore, being duly sworn, on his oath deposes and says that he is general solicitor for the Kansas City Southern Railway Company, the petitioner; that he assisted in preparing the foregoing petition, and that the allegations thereof are true, as he verily believes.

FRANK H. MOORE.

Subscribed and sworn before me this 18th day of June, 1927.

My commission expires October 21, 1928.

[SEAL.] CLARENCE R. HALL,
Notary Public in and for said County and State.

BRIEF OF PETITIONER IN SUPPORT OF ITS APPLICATION FOR WRIT OF CERTIORARI.

Petitioner (herein called the defendant) is praying for a writ of certiorari of the decision and judgment of the Supreme Court of Texas, made and rendered on, to wit, February 23, 1927 (Rec., 326, 328), and made final on its overruling defendant's motion for a rehearing on to wit, April 20, 1927 (Rec., 352). Said decision is not officially reported, but is unofficially reported (Franklin Jones, Admr., *v.* Kansas City Southern Railway Company, 291 S. W., 528).

The case is governed by the Federal Employers' Liability Act, and the Supreme Court of Texas, in passing on the questions of whether or not the death of D. R. Ferguson, for whose death this action was instituted, was caused or contributed to by his own negligence, or was the result of a risk assumed by him, erroneously refused to apply the interpretations of the law governing said questions as established by the Federal courts, but applied interpretations that were in conflict with the decisions of the Federal courts. Said questions were raised by pleadings (Rec., 8 *et seq.*), demurrers to the evidence (Rec., 23), by issues submitted to the jury (Rec., 39 *et seq.*), and on appeal (Rec., 188).

The Supreme Court of Texas, in its rulings, erred in the following particulars:

I.

The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to hold that D. R. Ferguson was guilty of negligence directly contributing to his death.

The facts in this case are not at all complicated. The decedent was presumably struck by a passenger train running on a track upon which his duties did not call him. This track was straight for over a mile south of the place where he was struck; the engine pulling the passenger train was equipped with a strong headlight, making it plainly visible during all of the mile or more that it traveled before it reached decedent, and it was making noise enough to be plainly audible to him, whether or not its bell was rung or its whistle sounded. Decedent knew the time when this train was due, and it was coming in on time. His daughter testified that, though no whistle was sounded nor bell rung, she heard the train coming out of Staples and all the way into Leesville, Staples being over a mile away (Rec., 78). There was no evidence that decedent was engrossed in any work at the time he was struck. When last seen alive he was apparently waiting for further work to be brought to him. There was no evidence that there was anything to distract his attention, or that there was anything to prevent his hearing the

train or seeing it. The only explanation of decedent's permitting himself to be struck by the passenger train is that he put himself in a place of danger without giving any heed or thought to the approach of the train, which was plainly audible, visible, and to be expected at that time. Indeed, the jury found that the train's headlight "blinded" decedent, and therefore the presence of the train must have been actually known to him.

Men working in railroad yards must be vigilant for their own protection and are responsible for the consequences of their own neglect.

In Aerkfetz *v.* Humphreys, 145 U. S., 418; 36 L. Ed., 758, it was held that a repairer of tracks, employed in a railroad yard which was used for the making up of trains, and who was familiar with the manner in which the work was done, and who, knowing that the switch engine was busy moving cars and making up trains, placed himself with his face away from the direction from which cars were to be expected, and continued his work without ever looking back, although there was no obstruction to his vision, and by ordinary attention he could have observed the approaching cars, and while so employed was struck and injured by the switch engine moving slowly, was guilty of contributory negligence, which prevented his recovery from the railroad company (for his injury). The Court said: "The plaintiff, by this negligent inattention, contributed directly to the injury."

In Frese *v.* Chicago, etc., Co., 290 Mo., 501; 235 S. W., 97, an engineer of a Burlington train was killed as the result of a collision with a Wabash train at a railroad crossing in Illinois. An Illinois statute required all trains to stop at such crossings, and that "the engineer or other person in charge of the engine attached to the train shall positively ascertain that the way is clear, and that the train can safely resume its course before proceeding to pass the * * * crossing." The Supreme Court of Missouri held that the engineer was responsible for his own death, even though there may have been a custom or usage in force upon the engine in question whereby it became the duty of the fireman to look out for approaching trains on his side of the train, and to notify the engineer in case he saw an engine approaching the crossing over which they were to cross. This judgment was affirmed on writ of certiorari to the Federal Supreme Court (263 U. S., 1; 44 S. C. R., 1), the Court saying:

> "The statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice, he could not escape this duty, and it would be a perversion of the Employers' Liability Act to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more."

In Chesapeake, etc., Ry. Co. *v.* Nixon, 271 U. S., 218, 219, 220; 46 S. C. R., 495, 496, this Court said:

> "If the accident had happened an hour later, when the deceased was inspecting the track, we think that there is no doubt that he would be held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The Railroad Company was entitled to expect that self-protection from its employees. Aerkfetz *v.* Humphreys, 145 U. S., 418; 12 S. Ct., 835; 36 L. Ed., 758; Boldt *v.* Pennsylvania R. R. Co., 245 U. S., 441, 445, 446; 38 S. Ct., 139; 62 L. Ed., 385; Connelley *v.* Pennsylvania R. Co., 201 F., 54; 119 C. C. A., 392; 47 L. R. A. (N. S.), 867; Davis *v.* Philadelphia & R. Ry. Co. (D. C.), 276 F., 187; Pennsylvania R. R. Co. *v.* Wachter, 60 Md., 395; 4 Elliott on Railroads (3d Ed.), Sec. 1862. The duty of the railroad company toward this class of employees was not affected by that which it might owe to others."

The same rule was applied by Federal courts of appeals in the following cases:

Pheasant *v.* Director General, 285 Fed., 342.

Frazier *v.* Interstate R. Co., 273 Fed., 181 (certiorari denied, 256 U. S., 703).

Dishon *v.* Cincinnati, etc., Co., 66 C. C. A., 345; 133 Fed., 471.

Allen *v.* New York, etc., Co., 98 C. C. A., 253; 174 Fed., 779.

Louisville, etc., Co. *v.* Woodward, 99 C. C. A., 479; 176 Fed., 5.

Miller *v.* Canadian, etc., Co., 281 Fed., 664.

See also, Soccorso *v.* Philadelphia, etc., Co., 166 Fed., 378; S. C., 170 Fed., 722 (D. C.).

The failure (if any) of the defendant to follow its custom (if any) to have the engine bell ringing on the train by which the decedent was struck did not excuse decedent's failure to observe the approach of defendant's passenger train.

Even if defendant's trains customarily rang their engine bells in coming into Leesville, and it failed to ring the bell on this train, and this failure was a breach of a duty it owed decedent, that did not excuse decedent's failure to discover the approaching train. The giving of warning signals is merely an additional precaution to warn parties of the approach of trains lest they fail in their duty to use proper diligence. In other words, it is a double precaution to assist the non-vigilant in case they are lax in their duty to protect themselves. The enginemen's duty to warn the plaintiff is no greater than is the plaintiff's duty to look out for himself. In each case the duty is to be performed by a human being, and it would be an anomalous situation to say that where a railroad company calls upon one employee to assist another in protecting himself, it thereby takes from the employee to be protected all responsibility for his own protection.

In Jacobs *v.* Atchison, etc., Co., 97 Kan., 247; 154 Pac., 1023, plaintiff sued for the death of her husband, killed by a railroad train at a grade crossing. She contended that an electrical warning bell failed to operate and that her husband had a right to rely on this bell and was excused from looking or listening for the train. The court, in that case, used language aptly fitting this case:

> "If the plaintiff's contention in this respect is correct, a railroad increases its responsibility and liability by putting in electric bells at highway and street crossings. The object in putting in electric bells is to promote public safety, not to increase railroad liability."

In a general way, the duty of a man working in a railroad yard is governed by the principle which is applicable to a highway traveler at a railway crossing. Even where railway companies are required by statute to give certain warning signals in approaching highway crossings, the courts hold that a highway traveler may not rely entirely on the compliance with these statutes, but that he must use due vigilance to look out for trains, and if he fails to use such vigilance the railway company is not liable even though it fails to give the signals required by law. There is this difference between the highway traveler and the railroad workman: The railroad workman's experience teaches constant vigilance. He is required to be keenly observant, to look out for himself, and he is trained in the exercise of that vigilance. This Court and other Fed-

eral courts have applied to railroad workmen the rule applicable to highway travelers at railroad crossings.

In Elliott *v.* Chicago, etc., Co., 150 U. S., 245; 37 L. Ed., 1068, the foreman of a section gang was struck by some cars moving in a "flying switch." A verdict was directed for the defendant, which was affirmed by the Supreme Court. "It thus appears that the deceased, an experienced railroad man, on a bright morning and with nothing to obstruct his vision, starts along and across a railroad track with which he was entirely familiar, with cars approaching and only 25 or 30 feet away, and before he gets across the track is overtaken by those cars and killed. But one explanation of his conduct is possible, and that is he went upon the track without looking to see that any train was coming. Such omission has been again and again, *both as to travelers on the highway and employees on the road*, affirmed to be negligent. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on the track, or that there is no danger therefrom." (All italics in this brief, unless otherwise indicated, are ours.)

In Erie R. Co. *v.* Kane, 55 C. C. A., 129; 118 Fed. 223, 234, a fireman on a switch engine was killed as the result of a collision between his engine and another switch engine. At the time of the collision he was standing on the front of the engine engaged in cleaning the number on the engine. It was a part of his duties to do this work, but not while the engine was moving.

"Counsel for defendant in error urged that it was not negligence for decedent to be there because he was not bound to anticipate Bowker's negligence, through which the collision came about. It is never negligence, they say, for one not to anticipate negligence in anybody else. There is, however, no such general rule of law or prudent conduct. There are instances where, as a matter of law, it is negligence not to anticipate negligence in others. As, for instance, it is well settled in the Federal Courts that *it is negligence for a highway traveler not to anticipate failure on part of an engineer to give appropriate signals of approach of his train to a highway crossing.* He has no right not to look or listen because he has heard no such signals. Mr. Justice Field, in the case of Railroad Co. *v.* Houston, 95 U. S., 697; 24 L. Ed., 542, said:

"'The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precaution for her safety. Negligence in the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen or look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into a place of danger.'"

The rule established in the Houston case was thus stated in a head note written by Mr. Justice Field for this Court:

"The neglect of the engineer of a locomotive of a railroad train, to sound its whistle or ring

> its bell on approaching a street-crossing does not relieve a party from the necessity of taking ordinary precautions for his safety. He is bound to use his senses—to listen and to look—before attempting to cross the railroad track, in order to avoid any possible accident from an approaching train. If he omit to use them, and walk thoughtlessly upon the track, he is guilty of culpable negligence; and if he receive any injury, he so far contributes to it as to deprive him of any right to complain. If, using them, he sees the train coming and undertakes to cross the track instead of waiting for the train to pass, and is injured, the consequences of his mistake and temerity cannot be cast upon the railroad company. If one chooses in such a position to take risks, he must bear the possible consequences of failure." (Chicago, etc., Co. *v.* Houston, 95 U. S., 697; 24 L. Ed., 542, 543.)

In Northern Pacific R. Co. *v.* Freeman, 174 U. S., 379; 43 L. Ed., 1014 (a crossing case), it was held that where a person approaching a railroad crossing well known to him, when a coming train was in full view and he could have seen it while 40 feet distant from the track if he had used his senses, but did not look, or took the chance of crossing the track before the train reached him, and was killed, he was guilty of contributory negligence, and could not recover, even if the railroad company failed to give proper warning. In its opinion the court said:

> "The duty of a person approaching a railroad crossing, whether driving or on foot, to look and listen before crossing the track is so

> elementary, and has been affirmed so many times by this Court that a mere reference to the cases * * * is a sufficient illustration of the general rule."

In Garlich *v.* Northern Pac. Ry. Co., 67 C. C. A., 237; 131 Fed., 837, 841, the court said:

> "The well-settled rule of law is that no reliance upon the exercise of care by a railroad company will excuse a lack of the exercise of proper care by a person going upon a railroad track, or so near as to be in danger from passing trains."

See, also, Chicago, etc., Co. *v.* Andrews, 64 C. C. A. 399, 130 Fed. 65; Tomlinson *v.* Chicago, etc., Ry. Co., 67 C. C. A. 217, 134 Fed. 233; and Rollins *v.* Chicago, etc., Co., 71 C. C. A. 615, 139 Fed. 639, the opinion in all of these four cases having been written or concurred in by Mr. Justice Van Devanter, then Circuit Judge.

In Bradley *v.* Missouri Pacific R. Co., 288 Fed. 484, it was held that a guest in an automobile was guilty of negligence as a matter of law in failing to look out for an approaching train which could have been seen and heard if reasonable care had been used to discover said train. There was testimony of witnesses that they did not hear any bell rung or whistle blown. The court said:

> "It is noteworthy in the evidence of plaintiff's witnesses that a number of them, who did not hear the bell ring nor the whistle blow,

> heard the rumbling and noise of the train before they saw it. * * * Why Brown and Bradley, under these circumstances, did not hear it, when nearly everyone else in the vicinity seems to have heard it, can only be conjectured. If they could not see the train, it was their duty to listen. If they could not hear because of the noise of the automobile, it was their duty to stop." (The verdict in this case was for the defendant in the District Court, and the judgment was affirmed on appeal although, under the statutes of Arkansas, the question of contributory negligence was for the jury, and contributory negligence could diminish, but not bar, a finding for the plaintiff.)

The same rule was applied by Federal courts of appeals in the following cases:

> Dernberger *v.* Baltimore, etc., Ry. Co., 155 C. C. A., 51; 243 Fed., 21.
>
> Payne *v.* Blevens, 280 Fed., 310.
>
> Atchison, etc., Co. *v.* McNulty, 285 Fed., 97 (certiorari denied, 262 U. S., 746).
>
> Bush v. Baltimore, etc., Co., 288 Fed., 845.
>
> Parramore *v.* Denver, etc., Co., 5 Fed. (2d), 912, 913.
>
> Atlantic, etc., R. Co. *v.* McLeod, 11 Fed. (2d), 22

II.

The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to hold that D. R. Ferguson was guilty of negligence which was the sole proximate cause of his death.

The jury found on special issues, 6, 7, and 8, that defendant's servants in charge of its passenger train failed to ring the bell on the engine of that train as it approached the place where said D. R. Ferguson was struck; that such failure was negligence, and that it was a proximate cause of his death (Rec., 37-38). The jury, however, also found on special issues 1 and 2 (Rec., 37-38), that the failure of defendant's servants in charge of its passenger train to dim the headlight of the engine of said train as it approached the place where D. R. Ferguson was struck was negligence, and that such failure "caused the said D. R. Ferguson to be blinded and thereby was a proximate cause of the death of said D. R. Ferguson."

It also appeared in evidence both on the part of the plaintiff and of the defendant that the noise and roar of defendant's passenger train was plainly audible long before it reached the place of the accident.

We earnestly insist that even if the engine bell had been silent, its silence was not a proximate cause of the death of decedent. It cannot be seriously contended that he was entitled to a particular kind of warning of the approach of the train, or to a particu-

lar kind of sound announcing such approach. There is no reason why the decedent, if he had been in the exercise of due care, could not have heard the noise and roar of the train just as the other witnesses did, and a finding that the ringing of the bell would have given notice of the approach of the train to one who failed to hear its rattle and roar is based on conjecture and speculation, and such a finding is not sufficient to support a judgment. (Chicago, etc., Co. *v.* Coogan, 271 U. S., 472.)

In St. Louis, etc., Co. *v.* Mills, 271 U. S., 344, 347, 348; 46 S. C. R., 520, a railroad inspector was shot to death by strikers on the back platform of a street-car on which he was riding home from work accompanied by a guard provided by the railroad company. It was contended that a railroad company was liable for failing to furnish more than one guard. This Court said that there was no "evidence from which the jury might infer that defendant's failure to provide an additional guard or guards was a proximate cause of decedent's death. Whether one or more additional guards would have prevented the killing is in the highest degree speculative. * * * On such a state of facts the jury should not have been permitted to conjecture what might have happened if an additional guard had been present." So, in this case, a finding that if the bell on defendant's engine had been rung it would have warned decedent in time for him to have gotten out of the way of the approaching train is purely speculative in view of the fact that the noise of the train loud enough for his daughter to hear it

a mile away, and the glare of the headlight which the jury found that he saw, were not sufficient for that purpose.

> "Conjecture is an unsound and unjust foundation for a verdict. Juries may not lawfully guess the money or property of one litigant to another." (Midland Valley R. Co. *v.* Fulgham, 104 C. C. A. 151, 181 Fed. 91, 95.)

When the jury found that the headlight on the passenger train was not dimmed and that it blinded decedent, it necessarily followed that he knew that a train was approaching. That fact would be self-evident to the most inexperienced person, and certainly must have been known to a railroad man familiar with electric railroad headlights. The jury, having found that decedent knew of the approach of the train because of the radiance of the headlight, a finding that the failure to ring the bell was necessary to warn him of the approach of that train was an inconsistent finding.

It goes without saying that one who has knowledge of an approaching train cannot complain of the failure of the operators of that train to give him notice of its approach.

> "We agree with the opinion of the supreme judicial court of Maine in Lane *v.* Lewiston, 91 Me. 292, 39 Atl. 999, that where a steam roller is allowed to remain upon a municipal highway it is requisite that the municipality causing the obstruction should give reasonable notice to the traveling public of its presence, but that a view

> of the obstruction itself in time to avoid it without injury amounts to notice. In other words, as stated by the Maine court, 'no one needs notice of what he already knows,' and 'knowledge of the danger is equivalent to prior notice.'" (District of Columbia *v.* Moulton, 182 U. S. 576, 581; 21 S. C. R. 840, 842.)

The sole purpose of warnings "is to acquaint the traveler with the danger, and, if he is possessed of knowledge of the danger independently of such notice, then the absence of notice, or his failure to see it if given, would not affect his rights" (Craine *v.* Metropolitan, etc., Street Ry. Co., 146 Mo., 393; 152 S. W., 24).

> "The evidence clearly showed that those in charge of the car saw the light from the train in advance of its approach long before it struck the car. They therefore did not need signals to advise them of its approach." (Goldberg *v.* Chesapeake, etc., Ry. Co., 211 Ky. 115, 276 S. W. 1086.)

In Blunt *v.* Pennsylvania, etc., Co., 9 Fed. (2d), 395, it was held that a crossing watchman who was struck by a truck which was thrown against him by a train, could not recover, as his business was to warn the driver of the truck of the approaching train, and his failure so to do was the proximate cause of the injury, even if the train was running too fast and failed to give warning signals.

See, also, Pheasant *v.* Director General, 285 Fed., 342.

III.

The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to hold that the death of D. R. Ferguson was the result of risks assumed by him.

D. R. Ferguson was an experienced railroad man, having worked in the yards in which he was killed for ten years. The train by which it is presumed he was killed was due at that point at that time, and he knew it. While there was evidence of a breach of custom that engine bells would ring in going into Leesville, yet the noise of the train and its headlight furnished just as effective warning of its approach as could the bell, and especially to one who is trained to be on the look-out for train and car movements, and who is aware that the train is due at that particular time. The jury found that he was blinded by the train's headlight, and therefore he must have seen it. In such circumstances the Supreme Court of Texas should have ruled that the death of D. R. Ferguson was the result of risks assumed by him even if it were true that the bell on this train was not ringing and that the defendant owed Ferguson a duty to see that it did ring.

In Southern Pacific R. Co. *v.* Berkshire, 254 U. S., 413; 41 S. C. R., 162, it was held that an engineer must have known of the presence of a mail crane near the track, and that his death from contact therewith was a risk assumed by him.

> "Linder had been upon this route for some years, had passed over it many times and must

> be presumed to have known of the crane * * *. An experienced railroad man cannot be supposed to have been ignorant that such a projection threatened danger, and, knowing so much, he assumed the risk that obviously would attend taking the chances of leaning well out from the train."

See, also, Chesapeake, etc., Ry. Co. *v.* Nixon, 271 U. S., 218, hereinbefore quoted.

An employee assumes risks not ordinarily incident to his employment, provided he knows of them and appreciates the danger, or provided they are so plainly observable that he must be presumed to know about them and to appreciate the danger. Atchison, etc., Co. *v.* Wyer, 8 Fed. (2d), 30.

In New York, etc., Co. *v.* McDougall, 15 Fed. (2d), 283, McDougall, a brakeman, was injured by coming in contact with a low bridge. It was held that his injuries were the result of a risk assumed by him.

> "The case affords an illustration of what may be assumption of risk without any contributory negligence, or in addition to it."

So far as concerns the failure to dim the headlight on the passenger train, it was shown that it was the universal practice for defendant's passenger trains going through the Leesville yards in the night-time to keep the headlights on such trains undimmed. There was evidence that this was the proper way to operate such trains (Rec., 166, 169, 171, 172, 173). Whether or not it was the proper way, it being defendant's prac-

tice and decedent necessarily being familiar with that practice, he assumed the risk of injury or death by reason of such practice.

IV AND V.

The Supreme Court of Texas, in a case arising under the Federal Employers' Liability Act, and on the facts in this case, erred in failing to reverse outright the judgment of the District Court, and in reversing the judgment of the Court of Appeals.

The judgment of the District Court in this case should have been disapproved for several reasons:

1. The Supreme Court of Texas should have found, on the facts, and under the authorities hereinbefore cited, that the Court of Appeals correctly decided that decedent's death was due in whole or in part to his own negligence.

2. The Supreme Court should have found that there had not been an acceptable adjudication that defendant was guilty of negligence. It was established by the great weight of the evidence that defendant's passenger train came into Leesville at its usual speed (Rec., 123, 133, 135); that proper whistle signals (Rec., 123, 129, 131, 132, 135, 159, 169) and bell signals (Rec., 123, 130, 132, 149, 152, 154) were sounded. See, also, opinion of the Court of Appeals, Rec. 184, 185). We appreciate that there is a general rule that appellate courts will not set aside verdicts merely because they are against the weight of the evidence. But that rule

ought not to apply when, as here, it is judicially found that the same jury has erred in its findings on other material issues.

3. The Supreme Court should have disapproved of the verdict of the jury because it contained self-contradictory findings. The jury found in this case, as we have heretofore shown, that proper signals of the approach of defendant's train were not given, and at the same time it found that the train's headlight "blinded" decedent. As the only purpose of the signals was to give notice of the train's approach, and decedent knew of that fact because its headlight "blinded" him, the alleged failure to give the signals or the alleged too rapid running of the train was not a proximate cause of the accident.

> "These findings of the jury being contradictory, it was the duty of the learned trial court to set aside the findings of the jury and grant a new trial, and the court's failure to so do, and his entry of judgment on such conflicting findings for defendant present error requiring a reversal of this case." (Stewart *v.* Schaff, Tex. Civ. App., 269 S. W., 135, 137. See, also, Kahn *v.* Cole, Tex. Civ. App., 227 S. W., 556; Wichita, etc., Co. *v.* Lechner, Com. of App. of Tex., 276 S. W., 216, 217.)

The finding by the jury that the headlight "blinded" decedent was a finding against the plaintiff, because it meant that decedent knew of the approach of the train, and as the headlight was customarily not dimmed on

defendant's passenger train, that "blinding" was a risk which decedent assumed.

VI.

The Supreme Court of Texas, in a case governed by the Federal Employers' Liability Act, erred in failing to follow the rules of law established by the Federal courts in construing the Federal Employers' Liability Act.

The reason for the decision of the Texas Supreme Court in this case is that the rule of the Texas courts in cases of this kind is entirely different from that established by this Court and other Federal courts. In the Federal courts if a person crossing or working upon railroad tracks fails to look and listen for approaching trains, having a reasonable opportunity to see or hear them, the court, as a general rule, finds that his failure so to do is negligence. In the Texas courts if a person crossing or working upon railroad tracks fails to look or listen for approaching trains, having a reasonable opportunity to see or hear them, his failure so to do is, as a general rule, held to be negligence only if it is found to be so by the jury. We have hereinbefore cited a number of cases illustrating the rule of the Federal courts. The following cases illustrate the Texas rule:

In Trochta *v.* Missouri, etc., Co., 218 S. W., 1038, decedent was killed while driving a team and wagon

across a railway track. He was familiar with the crossing. The train made much noise, was visible for 194 yards when he was 50 feet from the track, and when 35 feet from the track he could see along the track half a mile. The Court of Appeals (Missouri, etc., Co. *v.* Trochta, 181 S. W., 761) held he was negligent as a matter of law, but it was reversed by the Supreme Court of Texas, which said that "the failure of one about to go over a public crossing to look and listen for an approaching train, does not, of itself, constitute negligence as a matter of law." (Trochta *v.* Missouri, etc., Co., 218 S. W., 1038, 1039, 1040.)

In Emberlin *v.* Wichita Falls, etc., Co., 267 S. W., 463, a pedestrian stepped from a walk paralleling a track at a station, in front of an approaching train, and was struck by it. He could have seen it at any point within 50 feet of the track. The Court of Appeals (Wichita Falls, etc., Co. *v.* Emberlin, 255 S. W., 796) reversed the judgment because of plaintiff's contributory negligence, and was itself reversed by the Supreme Court, although the jury had found that deceased had not looked to see whether a train was approaching before he attempted to step on the track, and that he did not listen for a train as he approached the track.

In Jones *v.* Louisiana, etc., Co., 243 S. W., 976, decedent was killed by a railroad train on a crossing which was in an open, level prairie. When he came within about 100 feet of the crossing there was nothing to obstruct his view down the track for miles, except the telegraph poles fifty feet away from and

parallel with the track, and the cattle guards near the crossing. The Court of Appeals (Louisiana, etc., Co. *v.* Jones, 233 S. W., 363) had reversed a judgment against the railway company, because "the undisputed fact that the deceased in broad daylight drove upon a railroad track in the open prairie in front of a train of seven cars with nothing to obstruct the view of the approaching train *prima facie* forbids the conclusion that in so doing he was using ordinary care." The judgment of the court of appeals was reversed by the Supreme Court on the ground that "it is the peculiar province of a jury, under our jurisprudence, to determine what constitutes ordinary care under a particular situation, or combination of circumstances."

In Freeman *v.* Galveston, etc., Co. 285 S. W., 607, plaintiff while driving an automobile was struck and injured by a train at a grade crossing. The highway ran north paralleling the track, and at a point 250 feet east of the track turned westward at almost right angles. The crossing was on a prairie. There were some obstructing bill boards close to and east of the right of way, but after passing them there was no obstruction for 50 feet before reaching the track. The jury found that plaintiff had not been guilty of negligence, and judgment was rendered for plaintiff. The Court of Appeals (Galveston, etc., Co. *v.* Freeman, 273 S. W., 979) first affirmed and then reversed the judgment. The Supreme Court reversed the judgment of the court of appeals and affirmed the judgment of the district court.

In Missouri, etc., Co. *v.* Riddle, 277 S. W., 167, 168, the court of appeals applied this same Texas rule to

a case arising under the Federal Employers' Liability Act. J. A. Riddle was working in a bridge gang repairing a bridge. The work not having been finished, his foreman sent him out along the track to flag incoming trains. He flagged an approaching train when it was 1,000 feet away from him, but while the engineer reduced the speed of the train it was not stopped before reaching Riddle, and he was struck and killed by it. The jury found the train was run at a negligent rate of speed, and that the engineer negligently failed to stop it before reaching Riddle. A verdict and judgment in favor of his widow was affirmed by the court of appeals, although, as stated by Judge Stanford in his dissenting opinion, there was nothing to prevent Riddle's stepping from the track in an instant. Certainly no Federal court would ever hold that under the facts in this Riddle case it was a question of fact for the jury whether or not Riddle was in the exercise of due care in permitting himself to be struck by a train which he saw coming toward him.

In the light of these decisions it is hardly an exaggeration to say that under the Texas rule practically all crossing cases, and all cases where a railway employee is struck by a train, present a question for the jury as to plaintiff's contributory negligence.

It is also clear from an examination of these decisions of the Supreme Court of Texas that the rule established by that court as to what facts constitute contributory negligence is entirely different from the rule established by this Court and other Federal courts on similar facts.

As this action was brought under the Federal Employers' Liability Act the rights and obligations of the plaintiff and the defendant are to be governed by that act, and by the rules established by this Court and other Federal courts in construing the act.

> "The rights and obligations of the petitioner depend upon that act and applicable principles of common law as interpreted by the Federal courts. The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several States. This court will examine the record, and if it is found that, as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed. St. L., Iron M. & S. Ry. *v.* McWhirter, 229 U. S. 265, 277, 33 S. Ct. 858, 57 L. Ed. 1179; New Orleans & N. E. R. R. Co. *v.* Harris, 247 U. S. 367, 371, 38 S. Ct. 535, 62 L. Ed. 1167; New Orleans & N. E. R. R. Co. *v.* Scarlet, 249 U. S. 528, 39 S. Ct. 369, 63 L. Ed. 752."
>
> Chicago, etc., Ry. Co. *v.* Coogan, 271 U. S. 472, 46 S. C. R. 564.

In Williams *v.* Pryor, 272 Mo., 613, a case arising under the Federal Employers' Liability Act, the defense was made that plaintiff's injuries were the result of risks assumed by him. The Supreme Court

of Missouri held that the defense of assumption of risk was a common law defense and that it was "the unbroken rule in Missouri that the servant never assumes the risk where such risk grows out of the negligence of the master" (621, 623). Accordingly, a judgment for the plaintiff was affirmed. The case came to this Court on writ of certiorari. This Court held that in its view of the Federal statute and the defense under it, "the Missouri court erred (citing authorities) and the requirement of the act prevails over any State law." (Pryor *v.* Williams, 254 U. S., 43, 41 S. C. R. 36.)

From the foregoing authorities it is submitted that the decision of the Supreme Court of Texas is in conflict with and contrary to numerous decisions of this Honorable Court, and in conflict with the decisions of other Federal courts, and for that reason the writ of certiorari should issue in order that the rulings on the question arising under the Federal Employers' Liability Act may be uniform. The very uncertainty of the appellate courts of Texas as to the law of this case is a cogent reason why it should be reviewed here by certiorari.

Inasmuch as the case is one of great importance, and inasmuch as the decision of the Supreme Court of Texas is in direct conflict with numerous decisions

of this Court, it is submitted that the writ of certiorari should be granted.

Respectfully submitted,

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No. [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1927.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

FRANKLIN JONES, ADMINISTRATOR OF THE ESTATE OF D. E. FERGUSON, DECEASED, RESPONDENT.

ADDITIONAL BRIEF OF PETITIONER.

Frank H. Moore,
J. J. Link,
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S. W. Moore,
Of Counsel.

No. 349.

In the Supreme Court of the United States

OCTOBER TERM, 1927.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

VS.

FRANKLIN JONES, ADMINISTRATOR OF THE ESTATE OF D. R. FERGUSON, DECEASED, RESPONDENT.

ADDITIONAL BRIEF OF PETITIONER.

Respondent's Reply Brief to Petition for Certiorari contains a number of erroneous and misleading statements and assumptions; hence this additional brief. Petitioner will be called herein the "defendant," respondent the "plaintiff," and the deceased D. R. Ferguson the "decedent."

We have shown in our petition for writ of certiorari, and in our original brief herein, that decedent was a car inspector killed in defendant's yards at Leesville, Louisiana, probably by a passenger train of the defendant, which approached the place of the acci-

dent on a track which was straight for over a mile, and upon which the duties of decedent did not call him, the train coming in on time, its engine equipped with a bright headlight, which the jury found he saw, and the train making considerable noise, which others much further away plainly heard. We contend in our petition and in our original brief that the Texas Court of Appeals was correct in its holding that decedent was negligent in failing to observe and keep out of the way of said passenger train, and that the Texas Supreme Court erred in reversing the court of appeals. In his endeavor to answer this contention plaintiff makes a number of erroneous inferences and assumptions, of which the following are examples:

1. Plaintiff says in his brief (Brief, 3) that after the death of decedent it was found that the air had been coupled on the south 15 cars in the freight train which was being made up on the passing track, but the air had not been coupled on those north of these 15 cars, thus erroneously implying that there were then in the train cars which had not been inspected or coupled. Plaintiff also says that there was a free space of only 4 or 5 feet between a train on the passing track and a train on the main line, and that an inspector would "frequently, if not usually, get near enough to the main line to be struck by a passing train—a mere step, as there was barely room for one to stand in the clear" (Brief, 2). From these erroneous statements plaintiff makes the repeated and erroneous inference or presumption (for example pages 11, 16, 17 of his brief) that decedent's failure to see,

hear or heed the approaching passenger train was due to his being engaged in the coupling of the air hose and inspection of the cars north of the completed 15 cars, and to his being engrossed by such duties.

It appears from the testimony of R. T. Huson, a civil engineer of the defendant (Rec. 118, 119), and the finding of the Texas Court of Appeals (Rec. 182, 183), that the place of the accident was about 1200 feet south of the Leesville station. The defendant's railroad scales were about 500 feet south of the depot yard. The main line track between the Leesville depot and Staples, the next station south, was 7,804 feet, practically a mile and a half, the distance between the main line track and the passing track from center to center was 15 feet, from rail to rail 10 feet, and the space between cars on the main track and on the passing track approximately 6 feet. The witness who testified that the distance between cars was about 4 or 5 feet did not pretend to have made any measure of the distance but was merely making an estimate (Rec. 95).

Nick Franklin, a car inspector of the defendant called as a witness by the plaintiff, testified that the customary method in the inspection of a train that was being made up was for the inspector to begin with the cars next to the caboose and continue toward the head of the train, coupling the air and inspecting the cars one after another as he went along (Rec. 94, 95). He was called, upon the death of Mr. Ferguson, and it was his opinion that he arived at the freight train about 40 minutes or an hour after the accident (Rec. 96). He found the south 15 cars had the air coupled,

but those north of the south 15 had not had the air coupled (Rec. 94). L. E. Crawford, a witness for defendant, testified that about 12 or 15 cars had been thrown down to the caboose up to the time the passenger train came in (Rec. 145). At the time the passenger train came into Leesville the train crew and engine of the freight train were at the scale track (Rec. 149) some distance north of the place of the accident, where they were weighing cars, and shortly after the passenger train left, these cars were taken to the passing track and placed in the freight train (Rec. 176, 177; Burke, Rec. 136). A. H. Thorla, a witness for plaintiff, testified that he crossed the yards a short time before the passenger train came in. He saw some cars on the track next to the main line and passed about 30 or 40 feet north of the north car. When he passed the north car he saw Mr. Ferguson walking around there and carrying a lantern in his hand. Mr. Ferguson was then right about the end of the cars (Rec. 111, 112). Travis Barnhill, a witness for plaintiff, testified that he saw Mr. Ferguson before the train came in. His lantern was sitting on the ground and he was standing beside a car with his right hand on the side of the car, looking north, and he was at the north end of the car (Rec. 104). Reed Holton, a witness for the plaintiff, testified that he was with Travis Barnhill; that he saw Mr. Ferguson before the train came in, standing at the north end and on the west side of a car, with his hand on the car, his lantern sitting by him (Rec. 107). He was standing at the end of a string of cars (Rec. 109). See also the opinion of the court of appeals (Rec. 189).

No one saw the decedent at the time the passenger train passed, or for some time prior to its passing. No one testified that decedent was engaged in any work at the time the passenger train passed, or that he had just completed any work. So far as the evidence shows he had finished the coupling of the air and the inspection of the cars then on the passing track, and was waiting for the engine to bring additional cars to the track. Plaintiff's inference that decedent was engaged or engrossed in his work is not supported by any evidence in the record, nor is there any evidence tending to show why he should have stepped on or near the main line track without seeing the headlight of the coming train or hearing the roar and rattle of its approach. The court of appeals properly found that for twenty minutes before the passenger train arrived decedent "was not performing any duty there, although expecting more cars to be ultimately brought up to go in the train being made up. He was not engaged in inspecting the cars and in coupling them, as that work had been done as to the string of cars assembled. He was waiting for more cars to be brought there * * * The deceased failed to use any diligence to get away from the approaching train, having time to do so; and a judicial finding to the contrary is not warranted" (Rec. 189-190, 191).

2. Defendant says (Brief, 17) that it may be assumed that while decedent "was engrossed in his work, if he in fact heard the rumbling, the ordinary noises of the approaching train, he concluded that

the same came from the movement of the engine that was making up the freight train, and certainly that he may have concluded that there was no train in dangerous proximity to him."

It must be borne in mind that decedent was an experienced railroad man, with 10 or 12 years' service at Leesville as a car inspector. It must have been an eager jury indeed which could believe that decedent heard the rapid exhaust, and rattle and roar, of the passenger train coming from the south, and was justified in believing that it was a freight engine slowly shoving cars from the north, and that it was therefore safe for him to be on or near the main line track, without looking out for the passenger train which was due at that time and whose headlight, according to the finding of the jury, was visible to him.

3. Plaintiff makes the frequent inference in his brief (Brief, 5, 9, 16, 27) that decedent was confused by the blinding headlight on defendant's passenger train. The court of appeals held that "it is apparent from the evidence that an occasion of blame for the death cannot be predicated * * * in not diminishing the light of the headlight while going through the yard" (Rec. 187, 188, 189); and the finding of the court of appeals on that issue has never been modified or reversed, and is not subject to review here.

Furthermore, the ruling of the court of appeals was correct. Three witnesses testified that when one looks toward the headlight of a passenger engine within 200 or 250 feet of it the effect is blinding on the person so looking (Nelson, Rec. 85; Franklin, Rec. 116;

Anderson, Rec. 170). But there is no evidence in the record that the headlight is blinding if one does not look at it, and certainly a man of the experience of the decedent would not have been so confused by the headlight that he could not have stepped off of the main line track, either to the east or to the west, and have avoided being struck by the train.

There is no merit in plaintiff's contention that there was any negligence in failing to dim the headlight in going through the yard. The rules of the Interstate Commerce Commission require railroad companies to maintain dimmers on such headlights so that they may be dimmed, but the railway companies may use their own discretion as to when the dimmers should and should not be used. The practical purpose of them is to prevent the engineer of one train being blinded by the headlight of another when they are moving through railroad yards. There was no evidence of any order, rule or necessity that such headlight should be dimmed in going through a railroad yard on any other occasion, and, as shown by the testimony of executive officers of several railroads, the dimming of the headlight would tend to increase accidents rather than prevent them (Rec. 166, 169, 171, 173). See also, the opinion of the court of appeals (Rec. 189).

4. Plaintiff, having erroneously assumed that decedent was so engrossed in his work that he failed to heed the roar and rattle of the approaching passenger train, or its headlight, which the jury found he saw, further assumes (Brief, 13) that he might have been warned if the bell had made a "sharp sound" (Brief,

16). This is piling presumption on presumption, and purely speculative ones at that (*Cunard etc. Co.* v. *Kelley*, 126 Fed. 610; *Atchison etc. Co.* v. *DeSedille*, 219 Fed. 686). If the noise of the approaching train and the light of its headlight were not enough to warn decedent to step to a place of safety, how could it be fairly found that the ringing of a bell would have caused or enabled him to do so?

5. Appellant seems desirous of creating the inference (Brief, 1) that defendant "concedes" that the Supreme Court of Texas correctly held its alleged negligence in failing to ring the engine bell, proximately caused Ferguson's death, and thus eliminates the question of Ferguson's being guilty of negligence which was the sole cause of his death, and that we have "found no fault with the decision of the Texas Supreme Court in that regard." Our views on that question appear on pages 31 and 32 of our original brief herein, where we contend that the Texas Supreme Court should have found that there has not been an acceptable adjudication that defendant was guilty of any negligence.

The court of appeals reached the conclusion, from the character of the decedent's injuries (Rec. 190), and the blood-spots on the step of the pilot (Rec. 188), that the deceased must have been sitting or squatting near the outer ends of the ties under the east rail of the main line track when he was struck (Rec. 108). Plaintiff says that it is "conceded" that decedent was erect at the time he was struck (Brief, 5, 8, 9), and that the case was tried by both parties on that theory. No one saw decedent struck; no one

knows just what was his position; the question of whether he was standing or sitting is a matter of argument, and not of concession, and the court of appeals found he was sitting or squatting (Rec. 190).

6. In our original brief (p. 18) we contended that if it was the custom for defendant's trains to have their engine bells ringing in going through the Leesville or other yards, this practice was merely an additional precaution to warn of the approach of trains, employes or other persons who might be lax in their duty to be on the lookout for such trains. Plaintiff contends (Brief, 18) that the purpose of this practice was not to add an additional safeguard for the purpose of assisting employes in protecting themselves from death and injury, but was to take from them their instinct of self preservation, so as to increase efficiency and "output." There is no support in the evidence, record, fact, or conscience, for this reckless contention.

Respectfully submitted,

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Office Supreme Court, U.S.
FILED
MAR 8 1928
CHARLES ELMORE CROPLEY
CLERK

No. 349.

In the Supreme Court of the United States

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vs.

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REPLY BRIEF OF PETITIONER.

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STATEMENT OF FACTS.

The railway of the petitioner (herein called the "defendant") runs practically north and south (Rec. 118) through Leesville, Louisiana, a district terminal of the defendant (Rec. 126). D. R. Ferguson (herein called the "deceased") for about ten years prior to his death had been in the service of defendant as a car repairer and car inspector at Leesville (Rec. 73, 96, 97). On February 12,

1922, he was killed while in the service of defendant, presumably by a passenger train of defendant (Rec. 93, 94).

Defendant's main line between Leesville and Staples (Rec. 118), the next station south, is straight for a distance of about a mile and a half (Rec. 79, 90, 129, 131). This main line track adjoins defendant's Leesville yard, the main line being the westernmost track (Rec. 74, 93). The passing track is the next track to the east, and is parallel therewith. The distance between the centers of these tracks is 15 feet, and from rail to rail 10 feet, and between trains on the two tracks about 6 feet (Rec. 119). The other tracks are east of the passing track (Rec. 118).

At the time of decedent's death defendant's employees, including decedent, were making up an interstate freight train on the passing track (Rec. 87, 94), to go north (Rec. 133, 154). They had already placed a caboose and 15 cars on the passing track (Rec. 94). The engine and crew were assembling and weighing cars (Rec. 133, 134), the scale track being about 1,100 feet to the north (Rec. 120). The train was being made up about 1,600 feet south of the Leesville station (Rec. 120). Decedent had finished inspecting and coupling the air on the 15 cars and the caboose (Rec. 94). He was then apparently waiting for the crew to weigh and bring to the passing track other cars which were to be placed in the train (Rec. 95). Deceased was last seen alive about 6:45 P. M. (Rec. 105). He was then standing at the north end of the string of cars on the passing track with his hand on the north end of the last car in the string, and was looking north in the direction where the freight crew were weighing cars (Rec. 104, 107). His inspector's lantern

(Rec. 104) was sitting on the ground by him, facing east, or toward the freight cars (Rec. 107).

A northbound local passenger train of the defendant, due at Leesville at 7:05 P. M., arrived there on time (Rec. 79, 91, 113, 123, 135). Decedent was familiar with the scheduled time of this train (Rec. 79, 96, 117). About fifteen minutes (Rec. 155) after the train came in, the body of the decedent was found near the place where he had last been seen alive (Rec. 161). His lantern was still sitting upright between the main line and passing track (Rec. 102, 161). No one witnessed the accident. Though the engineer and fireman of the passenger train had seen the lantern sitting on the ground between the main line and passing track as they went by (Rec. 124, 132), they did not see the decedent. The engineer and fireman were first advised of the accident by telegraph at a station north of Leesville (Rec. 124, 132). They then examined the engine and found evidence of blood on the east side of the pilot of the engine (Rec. 124, 125, 132).

Defendant's passenger train was equipped with an electric headlight throwing a strong light several hundred feet ahead of the engine (Rec. 128, 177). One of the regulations of the Interstate Commerce Commission was that engine headlights "shall be provided with a device whereby the light from same may be diminished in yards and at stations, or when meeting trains" (Rec. 179). The headlight on this passenger train was equipped with a dimmer by which the engineer could reduce the light (Rec. 123, 177), but the headlight customarily was not dimmed while the engine was pulling a passenger train (Rec. 123, 124, 166, 169, 171, 173), and it was not dimmed on this occasion (Rec. 123, 124). There was no evidence offered that the regulations of the Interstate Commerce Commission required that these headlights be

dimmed in going through railroad yards. Plaintiff's assertion that this train was violating a safety appliance law is not supported by any evidence.

There was evidence that it was defendant's practice for its engineer to sound the whistle and the fireman to ring the bell on this train when coming into the city limits of Leesville (Rec. 79, 126, 132). Defendant's witnesses testified that the passenger train came in on time and at its usual speed (Rec. 123, 133, 135); that the whistle was blown for a crossing south of the place of the accident (Rec. 123, 129, 132, 160); that it whistled for the station announcing the train's approach to Leesville (Rec. 123, 129, 132, 135, 150, 160); and that the engine bell was ringing in going through the yards (Rec. 123, 129, 132, 149, 152, 154).

Decedent's children, and the husband of one of them, testified that defendant's passenger train was running faster than usual as it passed the place of the accident (Rec. 76, 81, 104, 108, 112); that no whistle was blown (Rec. 76, 81, 88, 99) as the train approached the place of the accident. Three other witnesses gave similar testimony (Rec. 104, 108, 112), two of these other witnesses, however, being directly contradicted by statements signed by them the day following the accident (Rec. 163, 164). These same witnesses also testified that the engine bell was not rung (Rec. 76, 81, 88, 99, 104, 108, 112). Plaintiff's witnesses admitted, however, that the noise of the train was plainly audible as it approached (Rec. 78, 83, 96, 100, 109, 114), decedent's eldest daughter testifying that while the train did not whistle at Staples (a mile and a half below Leesville), she heard it start out of Staples, and she could hear it all of the way to Leesville (Rec. 115). She, her husband, and another child of decedent who testified as to the signals and hearing the

noise of the train, were then at the home of decedent, which was about a block (Rec. 75, 93, 118) from the place where the accident occurred (Rec. 75, 100).

The evidence showed that customarily car inspectors worked on the side away from the main line in doing their inspecting (Rec. 156); that it was not convenient for them to work on the west side of the train while the train crew was at work putting cars into the train, although, when the crew was away, a man could work on the west side if he so desired (Rec. 159). There was also testimony that after the train was finally made up the inspector usually went up one side of the completed train and down the other for a general inspection and to test the air (Rec. 94).

There was no evidence that the decedent was engaged in any work at the time of, or immediately prior to, the accident, or that his mind was engrossed in his work, or that the whistle and bell signals were sounded for his particular benefit or for the benefit of car inspectors, the evidence being that they were sounded merely as a general warning to persons of the approach of the train (Rec. 127, 130, 132).

ARGUMENT.

I.

The theory upon which plaintiff seeks to support the verdict of the jury in this case is that the defendant desired to secure from its car inspectors a maximum amount of efficiency, and for that reason it induced them to rely upon the sharp sound of the bell for warning of the approach of trains, thereby implying that such car inspectors could disregard all other warnings or notices of the approach of trains; that they could go upon main line tracks at the time when passenger trains were due thereon without looking or listening for such trains, although such trains might be plainly visible and clearly audible.

It is needless to say that this theory is not supported by any evidence in the record, or by any inference to be based on any such evidence; that it is inconsistent with common sense, common prudence, and the law as frequently declared by this Court.

Plaintiff's theory of the law is directly contrary to the decision of this Court in *Baltimore & Ohio Railway Co.* v. *Goodman*, 48 S. C. R. 24, decided by this Court October 31, 1927. In that case, as in this, it was contended that adequate signals of the train's approach to a highway crossing were not given. This Court said, however, "It seems to us that if he relies upon not hearing the train or any signal, and takes no further precaution, he does so at his own risk." A judgment in favor of the defendant was reversed.

In *Toledo, St. Louis & Western Railroad Co.* v. *Allen*, decided by this Court February 20, 1928, plaintiff, a car

checker, was struck and injured by a shunted car while working in the railway company's yards at Madison, Illinois. He contended that the defendant was negligent in requiring him to work between tracks where there was an insufficient clearance, and in permitting the cars to be run down upon him without warning. The court held that he could not recover.

In *Missouri Pacific* v. *Aeby*, 48 S. C. R. 177, a station agent was injured as a result of a defect upon a station platform with which she was familiar. It was held that she could not recover even though the defendant may have been guilty of negligence.

II.

Even if the law would justify decedent in stepping or being in front of an approaching train which was plainly visible and clearly audible, because he was engrossed in his work, the evidence does not show that he was so engrossed.

The evidence showed that the customary method of making up a train is to place a caboose on the make-up track, and to build the train against that caboose. As the train is building, the car inspector begins with the first cars and inspects those cars and couples their air-hose. As the work on those cars is finished he goes on to the next cars placed in the train. As he finishes the cars then on the track he stands around and waits for more cars (Rec. 95). The car inspector who finished the inspection of the train after the death of decedent, testified that when he arrived the 15 cars that were on the track at the time decedent was killed had been inspected and coupled. There was no evidence that decedent was

doing any work about the cars at the time the passenger train came in, and therefore, no evidence of his being engrossed in any work even if it were true that his being so engrossed would excuse his failure to look out for trains and cars in going upon a railroad main-line at the time when a passenger train is due thereon, and plainly audible and visible.

We have shown in our former briefs that the jury found that the decedent was blinded or confused by the headlight of the passenger train. If that were true he must have known of its approach, and therefore the silence of the engine bell, if it were silent, was not a proximate cause of his death.

Plaintiff attempts to meet this situation by contending that the decedent came upon the track immediately in front of the train, and that therefore the headlight and the alleged silent bell might both be proximate causes of his death. It is true the fireman and engineer said they did not see the decedent, and it may be true that the decedent did come upon the track under the rays of the headlight and thus not be seen by the fireman and the engineer. In that event he would not have been blinded by the headlight. The decedent may have been sitting or squatting too near the track, possibly in the shadow of the reflector of his inspector's lantern sitting between the tracks, and this might have prevented the engine crew of the passenger train from seeing him. In the absence of any evidence on this subject it is a matter of pure surmise as to what he did and where he went upon the track, and where the train was at that time, just as it is a surmise that he was engrossed in his work at the time of the accident, and that he relied upon the ringing of the

engine bell on the passenger train to apprise himself of its approach, while relying on his own vigilance to protect himself from the movements of the engine and cars on the make-up track. See *Gulf, Mobile & Northern Railway Co.* v. *Wells*, 48 S. C. R. 151, decided by this Court January 3, 1928; see also *Oglesby* v. *Missouri Pacific Railway Co.*, 177 Mo. 272, 295, 296.

III.

The silence of the engine bell, if it were silent, was not a proximate cause of plaintiff's death.

It was shown by plaintiff's own evidence that the passenger train in question was producing a roar and noise as it came to the place of the accident. Plaintiff's daughter testified that she heard this train leaving Staples, a mile and a half away. There is no reasonable explanation of decedent's failure to hear and keep out of the way of this train. We have shown that plaintiff attempts to explain decedent's conduct by contending that decedent relied on an implied contract of the defendant to warn him of the approach of the train by ringing the bell, and that, even though the train was making a noise, he did not hear it because he was engrossed in his work. But the evidence did not show that he was so engrossed.

Plaintiff also contends that while the decedent may have heard the train, which was clearly audible, he may have mistaken the noise of the approaching train for the noise of the engine that was making up the freight train, and that in stepping from between the cars where he was working he hurriedly got away from them and looked

to the north to ascertain whether the light and noise were in fact from the engine of the freight train. This contention, also, is not founded on the evidence or on any reason. The roar of an approaching passenger train in no wise resembles the noise of an engine slowly pushing freight cars. Furthermore, this theory is irreconcilable with the theory that the decedent was blinded by the headlight of the approaching train, for the headlight was approaching from the south, and if he were looking to the north he could not be blinded by it. Plaintiff's inconsistent contentions are a clear demonstration of the fact that a finding by the jury that the decedent was in the exercise of due care at the time he was struck by defendant's passenger train must be based on surmise and conjecture. On one theory, the plaintiff did not hear the approaching passenger train, and was blinded by looking toward its headlight; on the other, he heard the noise of the train and came in its path while looking away from it.

As was said by the Supreme Court of Missouri in *Oglesby* v. *Missouri Pacific Ry. Co.*, 177 Mo. 272, 295, 296, where one piece of circumstantial evidence tends to prove one fact and another piece of circumstantial evidence tends to prove the contrary, a finding based thereon is purely conjectural.

On page 49 of plaintiff's brief is the following frank statement: "Where circumstances must be relied upon to ascertain the precise cause of death, an inference must be drawn. We frankly state that we believe the jury would have been justified in finding against respondent in this case."

This is a confession that the circumstances point as strongly to non-liability as to liability. And yet plaintiff contends that a verdict based upon such circumstances is

not a purely conjectural verdict, and ought to be sustained.

Respectfully submitted,

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Supreme Court, U.
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RESPONDENT.

REPLY BRIEF TO PETITION FOR CERTIORARI.

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REPLY BRIEF TO PETITION FOR CERTIORARI.

The petitioner contends that Ferguson was guilty of negligence which contributing with its negligence caused his death; or that Ferguson was guilty of negligence which was the sole cause of his death; or that Ferguson met his death by reason of risks assumed by him. However, in conceding that the Supreme Court of Texas correctly held its negligence in failing to ring the bell proximately caused Ferguson's death, it eliminates the question of Ferguson being guilty of negligence which was the sole cause of his death.

These propositions are presented in the petition for *certiorari* in such way that is confidently believed they may be collectively answered in one general statement and remarks under same; we therefore present a brief reply to same, and will then take up the propositions of the petitioner and answer them more fully and somewhat in detail.

Petitioner has found no fault with the decision of the Supreme Court of Texas, holding that it was guilty of negligence proximately causing Ferguson's death in failing on the occasion in question to follow its self-imposed custom of ringing the bell to warn Ferguson and those similarly situated of the approach of the train.

The question of contributory negligence, if any there was in the case, and the question of assumed risk, if any present, were issues of fact; and each was resolved against the petitioner by the jury.

The petitioner was making up a northbound freight train in its yard at Leesville, Louisiana, on a track alongside the main line. When both of these tracks were occupied by cars, there was a free space of only four or five feet (R. 95). It is perfectly apparent that in stepping from an inspected car, the inspector would frequently, if not usually, get near enough to the main line to be struck by a passing train—a mere step, as there was barely room for one to stand in the clear; hence, the wisdom of the custom of ringing the bell to warn him—and of not violating it.

The work was being done in the usual way, by first placing the caboose of the train near the south

end of the side track, and then from time to time pushing and shunting cars in onto the caboose from the north end of the track. The deceased was a car inspector, apparently the only one on duty at the time, and it was his duty to inspect the cars as the train was built up so as to have the inspection practically completed by the time the last cars should be placed in the train, thereby avoiding delay.

There is a strong inference, if not a legal presumption, that deceased was not guilty of negligence, but on the contrary carefully responded to the natural desire to live.

In the discharge of his duties it was necessary for the deceased to go between the cars of this freight train (at each opening) that was in the making (R. 94), see that they were coupled, connect the air hose, and inspect the safety appliances; in short to make a detailed inspection, and when more cars were shunted or pushed in on those already on the track, the same work was continued with reference thereto. Cars were being continuously sent in to become a part of this freight train.

When Ferguson was killed, he had made inspection of about 15 cars on the south end of the freight train. The car inspector who took charge after his death said (R. 94) "All of those cars had the air hose connected up, but the air hose on the cars north of his body had not been coupled up."

The deceased was seen by L. E. Crawford, one of the employees of the petitioner, about twenty minutes before he was killed, at which time he was en-

gaged in inspecting the cars of the freight train referred to (R. 145). He was seen just a few minutes before he was killed by the witness, H. Thorla, probably the last person who saw him alive (R. 112), and was then apparently engaged in inspecting cars of this freight train that was being built up on the side track adjacent to the main line. The work of inspection is described in much detail by the witness, Nick Franklin (R. 94 and 95), but concretely stated, consists of the inspector looking over the side and grab irons, then passing between it and the next car to see that the couplers are properly connected; couple the air hose; inspect the safety appliances; then step out from this place, and proceed to the end of the next car inspecting as he goes and then repeat the same duties between the cars, and when necessary, to make light repairs of the safety appliances.

In doing this work in the customary way, and in stepping back from the opening between the cars, the inspector would step several feet away from the cars he was inspecting, bringing him close to the main line track.

The engineer (R. 124) and fireman (R. 132) on the north bound passenger train which struck and killed Ferguson somewhere around 7:05 p. m. (and possibly less than four minutes after Tholar had seen him), testified that as they passed through the yard, they kept a lookout and saw Ferguson's lighted lantern sitting between the main line track, and the string of freight cars of the train that was being made up, and

that Ferguson was not on the main line, or between those tracks as the train approached.

The proof shows that objects immediately in front of the locomotive are not visible by those operating the engine, but that at a distance of some seventy feet or more from the front end of the locomotive, objects on and near the track are plainly visible. It was conceded in the trial, in fact the case was tried on the theory that Ferguson was in an erect position when he was struck by the pilot beam and killed. The location of the wounds to Ferguson's torso (R. 122) showed that at the instant he was struck by the pilot beam he must have been facing southeast diagonally away from the approaching train with the right side of his back in position to be first struck (R. 122). Thus it would appear that Ferguson stepped from between the cars where he was working, after the engineer and fireman had ceased to observe the track in front of them, and that being misled as to the distance of the approaching train, by reason of the custom of ringing the bell not having been followed, and probably confused by the bright headlight, he accidentally came in the path of danger and was struck by the pilot beam and killed.

The question of whether Ferguson was guilty of contributory negligence, certainly could not be resolved against him as a matter of law, but if raised by the evidence, was an issue of fact for the determination of the jury, and if so, this court will not be concerned with the disposition of that issue of fact by the jury, and approved by the Supreme Court of the State of Texas; therefore, the theory that Fer-

guson was guilty of contributory negligence as a matter of law, insisted upon by the petitioner, is without merit.

Considering the other contention of petitioner, namely: That Ferguson met his death as the result of a risk assumed by him, we really fail to appreciate the force of petitioner's contention. It has been determined by the jury, and by the Supreme Court of the State of Texas, that Ferguson met his death as the result of negligence—in that petitioner failed to comply with the custom which it had voluntarily established of ringing the bell as that particular passenger train passed through the yard at Leesville, as a means of safety to the car inspectors, by bringing sharply to their attention, that the approaching train was dangerously near; and it does not in this court complain of the correctness of such conclusion. There is no contention that this custom had ever been breached before the time Ferguson was killed, and certainly Ferguson did not assume the risk of dangers presented through the negligence of his master—not having any notice of even a remote probability of such negligence.

When one considers the manner in which Ferguson's duties were discharged, and the necessity of prompt performance in getting out the freight trains of the master, the necessity for establishing the custom of through trains ringing the bell as they passed along where his work was to be done, becomes manifest, but we are not dependent upon the wisdom of this requirement being visited upon the master, for it ap-

pears without controversy, that the petitioner had voluntarily established that custom as a means of protection to men engaged in the very work in which Ferguson was engaged (R. 130 bottom of page). Certainly the petitioner could not establish a custom or usage for the benefit of Ferguson, and then contend that Ferguson assumed the risk of it not discharging the voluntary burden it had assumed. In other words, it cannot be reasonably contended that Ferguson should have anticipated that the master would be negligent in the very particular of violating a custom which it had established for the protection of the very person who was injured by the negligent breach of that custom.

Ferguson did not assume the risk of injuries due to the master's negligence, unless he knew of the negligence and appreciated the danger to himself therefrom in time to in the exercise of ordinary care, have avoided injury. This doctrine is axiomatic and is fully discussed in *Gilla Valley Railway Company* v. *Hall*, 232 U. S. page 94.

There being no contention that Ferguson knew, or had any reason to anticipate negligence such as resulted in his death, the doctrine of assumed risk was not a question at issue in the case, but certainly if it could possibly be contended that it was raised by the evidence, it was an issue of fact which the jury has in its prerogative resolved against the master, and its decision is final.

Inasmuch as it was conceded by both the plaintiff in error and defendant in error on the trial of

this case, that Ferguson was not on the main line, or between the train that was being made up on the side track and the main line, until the train that killed him reached a point near where his lantern had been left between the main line and the train that was being made up, and that Ferguson thereafter came in such close proximity to the main line as to be struck by the pilot beam and killed, the jury had the right to conclude (as it did), and find from the evidence that Ferguson was busily engaged in some work between two of the cars of the train that was being made up, such as coupling the air hose, or doing some other work necessary, and that he finished the work, and stepped from between the cars and far enough away from them to be struck by the pilot beam. No rule or custom prescribed the distance Ferguson might step from the freight cars. Then viewing these facts in connection with the fact that the plaintiff in error established the custom of causing the bell to be rung as the passenger train passed through the yards for the purpose of warning car inspectors of the approach of the train (as testified to by the conductor of the passenger train, R. 130), and the dangerous proximity thereof, and that the Supreme Court of Texas has accepted the jury finding that a failure to ring the bell on the occasion in question, was negligence which proximately caused the death of Ferguson, and that there is no complaint in this court of the correctness of that conclusion so reached by the Supreme Court of Texas; we must view the finding of the jury that Ferguson was free of contributory negligence in light

of all of these circumstances. That is to say in balancing the evidence on the issue of Ferguson's contributory negligence, the jury had the right, and in fact it was its duty, to take into consideration the character of work in which Ferguson was engaged, including the common knowledge as well as the testimony to that effect, that Ferguson was to do the work of inspecting and connecting up the freight train somewhat hurriedly so as to avoid delaying that train; and the fact that Ferguson knew that the plaintiff in error had voluntarily established the custom of ringing the bell on the train as it passed through the yard, so as to give him timely warning of its dangerous proximity; and the probability of Ferguson becoming confused when he stepped from between the cars by reason of the bright light and made an effort to protect himself by turning from it to get his bearings, but which brought him in the path of the pilot beam; and if from all of these facts and circumstances, reasonable minds might differ as to whether Ferguson was guilty of contributory negligence in getting near enough the main line to be struck, then the finding of the jury in his favor on that issue is conclusive.

It occurs to us that it is very clear that the evidence raised an issue of fact as to whether Ferguson was guilty of contributory negligence, for even if he had known of the approach of the train, in view of the fact that the railway company had established the precedent of ringing the bell to warn him of its dangerous proximity when it should reach such a place as to make it dangerous to him, the jury had the right to

conclude that Ferguson was not guilty of contributory negligence in failing to anticipate that the self-imposed custom would be on this occasion needlessly violated.

AUTHORITIES.

Evidence sufficient to show Ferguson's mind concentrated in his work.

Myers v. *Pittsburg Coal Co.*, 233 U. S. 184.
Choctaw Oklahoma & Gulf Ry. Co. v. *McDade*, 191 U. S. 64.
Marande v. *T. & P. Ry. Co.*, 184 U. S. 173.

Contributory negligence an issue of fact.

Railway Company v. *Stout*, 17 Wallace 657.
Richmond & Danville R. R. Co. v. *Powers*, 149 U. S. 43.
Kreigh v. *Westing House, Church, Kerr & Co.*, 214 U. S. 249.
McDermott v. *Severe*, 202 U. S. 600.
Shearman & Redfield—Negligence, 6th Ed. Sec. 114 (Note).

No assumed risk.

Gila Valley Ry. Co. v. *Hall*, 232 U. S. 94.
Union Pac. Ry. Co. v. *Huxoll*, 245 U. S. 535.
McGovern v. *Phil. & R. R. Co.*, 235 U. S. 389.
Sea Board Air Line Ry. Co. v. *Konnecke*, 239 U. S. 353.

The Court of Civil Appeals of Texas contended that Ferguson was sitting or squatting on or near the main line track, and negligently remained there until struck by the step of the pilot. The petitioner repudiated that theory (R. 222)—in fact, the case was tried by both parties on the assumption that Ferguson came in the path of the pilot beam in an erect position. The

Supreme Court of Texas reversing the Court of Civil Appeals, held that the jury had the right under the evidence to conclude that Ferguson was not guilty of negligence.

This case should not be confused with those cases in which it has been held that men who work on the track must protect themselves against the movement of trains which they know will be moved over the track without warning, such as:

> *Aerkfetz* v. *Humphreys*, 145 U. S. 418.
> *Chesapeake & Ohio Ry. Co.* v. *Nixon*, 271 U. S. 218.

It is a matter of the commonest knowledge that the very nature of the employment of a car inspector requires the concentration of his mind upon the work in which he is engaged, for upon its faithful performance, the safety of the train—the lives of employees and passengers—depend. This prompted petitioner to adopt the plan of ringing the bell, to notify Ferguson of the dangerous proximity of the train. The right of Ferguson to rely upon that warning, together with the character of his work, etc., must be taken into consideration in passing upon the question of contributory negligence.

PROPOSITIONS OF PETITIONER.

The respondent will now present an answer to the propositions of petitioner in the order in which said propositions are presented in its brief.

I.

In its first proposition the petitioner contends that Ferguson was guilty of negligence which as a matter of law contributed to his death.

Inasmuch as the burden of establishing contributory negligence was upon the petitioner, and it was submitted to the jury (R. 16) and found against it (R. 37) this court will not be interested in considering the question further than to ascertain that the evidence was not so conclusive of contributory negligence as that reasonable minds might differ as to whether it existed. That is to say when it shall be made to appear to this court that there was substantial evidence raising an issue as to whether Ferguson was guilty of contributory negligence, this court will accept the finding of the jury on that issue.

The petitioner used the sidetrack next to the main line for making up north bound freight trains; there was testimony that there would be a clear space of only four or five feet between cars on that track and a passing train (testimony of Nick Franklin, R. 95). The car inspectors might inspect from either side of the cars; the petitioner has established the custom of requiring the engine bell to be rung on north bound

trains passing over that part of the main line to sharply notify car inspectors when such trains reached a place where they would endanger their safety. Conductor Proud said (R. 130, near bottom of page):

> "The idea of keeping the bell ringing was to apprise car inspectors and everybody else in the yard that a train was going through the yard, that the train was approaching—in other words, it is a separate and distinct noise from the noise of the train, and you can hear the bell above all that, it is a distinct noise of itself, and is a warning of the presence of the train."

The petitioner had established the common sense practice or custom of having the car inspector inspect its freight trains as they were being made up, beginning with the first cars shunted in to the caboose, and if practical have the work of inspecting the train finished by the time the last car was placed in same. After detailing how an inspector would inspect those cars, Nick Franklin testified R. 94:

> "He did it in the most expeditious way owing to the speed the cars were being put in."

Nick Franklin, a car inspector of long experience in describing the manner of making inspection of freight cars while a train was being made up on the track next to the main line (R. 116) testified that the inspector would set his lantern down and go between the cars and connect up the air hose, and says (R. 116):

> "A person making the inspection of a train that way, would move away from the standing cars about two, or three or four feet, get back in the

clear several feet, that is, the practice and habit of the inspectors. With reference to the distance between the main line and the passing track where Ferguson was killed, that inspectors were in the habit of moving from the cars, in stepping away from them, the main track and the switch track are right there close together, and when cars were on both tracks, there wasn't but three or four feet between the cars, and when you stepped back from the switch after making an inspection, you would step back close to the main line."

T. H. Burke, the conductor on the freight train that was being made up after stating that his engine had placed some cars in on the passing track where the train was being made up, testified with reference to the time these cars were placed on the passing track before the passenger train came in as follows (R. 135):

> "The best I can remember we had been away from there about twenty or twenty-five minutes when the plug came in that night—we must have left down there to go away I suppose about 6:40."

The witness, A. H. Thorla (R. 111) passed those cars placed in on the side track a very short time before the passenger train came in, and as he passed he saw Ferguson with his lantern moving along side the cars as if inspecting the same.

The engineer on the passenger train (R. 124) and the fireman (R. 132) each testified that as they passed through the yard they kept a lookout and saw a lighted lantern between the main line track and the cars on the side track, but that no person was between the tracks or on the main line.

No one saw Ferguson when struck by the pilot beam, and no one saw his movements immediately before he was struck. The petitioner accepts the silent, but impressive blood stains on the pilot beam as conclusive that it caused his death. The question of whether his conduct was such as to constitute contributory negligence must be determined by the circumstantial evidence which the parties have been able to produce.

There is no necessity of resorting to conjecture; for inasmuch as it was Ferguson's duty to inspect the cars of this freight train as they were being placed on the track next to the main line; (R. 116) and inasmuch as he was killed in approximately twenty-five minutes after the time Conductor Burke says they placed a string of cars on that track (for him to inspect) and left it to go to the scale track; (R. 135) and inasmuch as he was seen by Thorla passing along this string of cars within three or four minutes of the time he was killed; (R. 111) and inasmuch as the inspector who took up the work after he was killed, found that some fifteen cars had already been inspected, and the air hose connected up; (R. 94) and inasmuch as the engineer (R. 124) and fireman (R. 132) as their train approached where he was killed, saw his lantern on the ground between the tracks; and inasmuch as it was the custom for car inspectors to place their lantern on the ground or end of the ties when they went between the cars to connect the air hose; (R. 115) and inasmuch as Ferguson must have been between the cars as the engineer and the fireman approached his lantern; the jury had the right to conclude that Ferguson did not carelessly step

from between the cars and into the line of danger, with knowledge or charged with knowledge that the train was then rapidly approaching; but rather, that being engrossed in his work and having become accustomed to take heed of the warning that the sharp sound of the ringing bell would give him, he was misled into believing that no train was within dangerous proximity to him, and probably was blinded by the glaring headlight, all of which confused him, and in his efforts to get to a place of safety, or to turn from the light so as to get his bearings, he inadvertently stepped into the path of danger, and received his injuries.

In passing upon the question of the presence or absence of contributory negligence on the part of Ferguson, we must remember that the burden was upon the petitioner to establish contributory negligence, and it has offered no testimony raising that issue, other than the fact that he was killed by a train that was being negligently operated. In this connection, it is not amiss to consider that for many years Ferguson had faithfully discharged his duties without being injured. That he was a competent and careful man is emphasized by the testimony of the man who had been his boss for more than two years, who says (R. 157-158):

> "Mr. Ferguson was a car inspector under me about two years and six or eight months; he was never laid off during that time, and there was never a black mark against his work during that time; I never so much as had a criticism against his work that I can recall" (S. F. 136).

The petitioner seems to misunderstand the scope and effect of the case of *Aerkfetz* v. *Humphreys*, 145 U. S.

418, and other similar cases, which are not at all applicable to the facts of this case. The Supreme Court in the Aerkfetz case merely held that one working on a track over which cars were being constantly shunted in a switch yard, took the situation as he found it, and as there was no custom of notifying him of the approach of cars, negligence could not be predicated on a failure to do so. Likewise, having full knowledge of the fact that cars were constantly shunted over these switch tracks without notice being given to men working on the tracks, he assumed the risk of being injured by such movement.

This case is in line with the case of *McGovern* v. *P. & R. R. Co.*, 235 U. S. 389—and the case of *Sea Board Air Line Ry. Co.* v. *Konnecke*, 239 U. S. 353—in that the deceased had the right to act upon the assumption that the petitioner would comply with its self imposed custom of ringing the bell to warn him of the dangerous proximity of the train. One may assume that while the car inspector was engrossed in his work, if he in fact heard the rumbling, the ordinary noises of the approaching train, he concluded that the same came from the movement of the engine that was making up the freight train, and certainly that he may have concluded that there was no train in dangerous proximity to him. In fact, we may go a step further and without resorting to conjecture easily reach the conclusion that he mistook the noises of the approaching train for noises of the engine that was making up the freight train, and that in stepping from between the cars where he was working, he hurriedly got away from them and looked

to the north to ascertain whether the light and the noise were in fact from the engine of the freight train.

The petitioner says:

> "The giving of warning signals is merely an additional precaution to warn parties of the approach of trains lest they fail in their duty to use proper diligence. In other words, it is a double precaution to assist the non-vigilant in case they are lax in their duty to protect themselves."

One having the smallest modicum of knowledge of the operation of railroads and trains, readily appreciates the fallacy of that statement. Such customs are established so as to increase the output and efficiency of the workmen. The car inspectors and other workmen would be forced to measurably neglect, or at least delay the performance of their duties if they were required to assume the burden of discovering the approach of trains which suddenly came into the yard without warning. The petitioner saw fit to place upon the operatives of the locomotive the small burden of ringing the bell, thereby relieving the inspector of trying to carry the burden of anticipating and providing against danger from passing trains, as well as the burden of charging his mind with the discharge of the duties connected with his job.

There has never been a rule of law—there probably never will be, to the effect that a person engrossed in his work which encompassed and embraced the necessity for looking out for cars that might be shunted in on others while he was between them making inspections, must neglect his work, and listen for a train, the ap-

proach of which he had the right to assume would be heralded by the ringing of a bell.

One is held guilty of contributory negligence where he relies on another not being negligent only in those cases where the injured party is shown to have had full opportunity to have discovered the danger and negligently failed to exercise care for his own safety; where without having anything to divert his mind to other matters, he carelessly gets in the path of pending danger; such as where a pedestrian heedlessly steps upon a railway track immediately in front of an approaching train. But where the testimony and inferences to be drawn therefrom; and the presumption that one killed has exercised proper care, raise the issue of the mind being drawn away from impending danger, the question of contributory negligence is for the jury.

There is nothing in this case to indicate that Ferguson did not have the right to get near or even upon the main line.

It is said Ferguson knew the time the passenger train would reach Leesville. But he certainly was not required to work with his watch in his hand—in fact it would have been impossible for him to do so; and why adopt the custom of ringing the bell instead of depending upon the ordinary noise of the approaching train, if men engrossed in their work could not rely upon it as a warning.

It is argued by petitioner that the train was visible and made much noise, and that deceased should have known of its approach; but such argument ignores the fact that petitioner was violating its custom of ringing

the bell, and that the evidence justified the jury in finding that Ferguson was engrossed in his work, and in watching the movements of the switching train. It is believed that it has been quite universally held that where one is engaged in work, or has his attention in any way diverted from the danger, that he is not guilty of contributory negligence in failing to anticipate negligence of the wrong doer. Certainly if it be viewed as an original proposition, it must impress one that such rule should prevail, for it would be impossible for the traffic of the world to be moved for a day, or for one to go to or return from his office without assuming that others would not be guilty of negligence in their movements.

It is believed that it is quite universally established that negligence and contributory negligence are issues of fact for the determination of a jury, except in cases involving statutory regulations, and those cases in which the minds of reasonable men can not differ as to the conclusions that should be reached. The question of what should and what should not be submitted to the jury naturally brings us to the case of *Railway Company* v. *Stout*, 17 Wallace, 657.

This case has so long been recognized as the leading authority upon this question, and has been quoted so often that practically every lawyer in the land knows by heart the principles therein laid down. We quote, not to apprise this court of anything which may be termed elementary authority, but because we deem it as applicable to this case, and because it expresses the princi-

ples involved herein as well as they have been expressed, or ever can be expressed.

> **"Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of the jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus concurring than can a single judge."**

We herein offer and commend to the court's attention some of the cases which recognize and follow the rule. We trust that, in thus presenting such a voluminous list of authorities, we are not unduly trespassing upon the court's time; but we feel that, though the question as to what should and what should not be left to the jury has been settled countless times, nevertheless it is incumbent upon us to produce authorities sustaining our viewpoint, and to present them, to the best of our ability, in such manner as least to inconvenience this court in reviewing them.

In the case of *Richmond & Danville Railroad Co.* v. *Powers*, 149 U. S. 43, the United States Supreme Court, speaking through Mr. Justice Brewer, says:

> "The only error assigned is in the refusal of the court to instruct the jury as requested, substantially that the deceased was guilty of such contributory negligence as to prevent a recovery. **It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them.**"

This case has been quoted many times, always with approval. We name one case, *McDermott* v. *Severe*, 202 U. S. 600, 50 L. Ed., 1162, in which the court says:

> "Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence. **If fair-minded men, from the facts admitted, or conflicting testimony may honestly draw different conclusions as to the negligence charged, the question is not one of law, but of fact, and to be settled by the jury under proper instructions.**"

It is not essential to sustain a recovery in cases like this that there should be direct evidence by the mouth of eye witnesses to the occurrence. The manner in which the accident happened, as well as the absence of contributory negligence may be established by circumstances.

In *New York Central Ry. Co.* v. *Gapinski*, 161 C. C. A. 354, the plaintiff, Gapinski, was injured while bend-

ing over stuffing grease into the journal boxes of freight cars. His injury was claimed to be due to the fact that he was struck by some projecting object upon a car which was "sent down upon the track on which or alongside of which he was working."

Gapinski testified that he did not know what hit him because when struck he was stooping or leaning over and working. "There was direct evidence that many of the cars" which were "sent down on said track were 'crippled,' i. e. cars 'with doors hanging out.' "

The testimony as to the crippled cars was denied, and the issue being submitted, Gapinski had a verdict.

The opinion of the court is as follows:

> "It is, we think, sufficient to dispose of this writ to refer to *Smith* v. *Pennsylvania R. R. Co.*, 239 Fed. 103, 151 C. C. A. 277. We there pointed out that, where there was no proof that any definitely indicated thing wrought the injury complained of nor 'that the circumstances rendering it possible for the injuring thing suggested **by plaintiff** to reach or touch, **plaintiff** existed at the time and place of damage, any verdict resting on such evidence, or lack of it, would be building one presumption upon another.
>
> "In that case, the suggested instrument of injury was the swinging rake hook of a passing locomotive. In this case, the suggested cause of plaintiff's hurt was a door hanging or projecting below the car body to which it belonged. But in the Smith case, **there was no evidence whatever** that any rake hook was projecting at the time when and place where plaintiff was injured. In this case, there is direct evidence that not one, but several, if not many, cars having such unusual and dangerous projections were moving upon the

track along side of which plaintiff here was required to work.

> "**If the jury believe (as it did) this positive testimony of moving crippled cars, it was within their province to draw the inference that such proven projection did the hurt.** In the Smith case, there was no proven projection. We think the case cited and the present one **considered together** perfectly illustrate the difference between a legitimate presumption from proven facts, and an attempted and unlawful presumption from another presumption."

In the case of *Kreigh* v. *Westinghouse, Church, Kerr & Co.*, 214 U. S. 249, 53 L. Ed. 984, the supreme court said, speaking through Mr. Justice Day (page 258):

> "Questions of negligence do not become questions of law, to be decided by the court, except '**where the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish.**' *Gardner* v. *Michigan Central R. Co.*, 150 U. S. 349, 361; 37 L. Ed. 1107, 1110."

We next offer the case of *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184, 192, 193, 194; 58 L. Ed. 906, 911. In that case, Myers was a brakeman on an underground mining train and had ridden a string of cars in on a switch. The electric motor car followed these cars in on this switch, where it ran upon something and was stopped. It was then discovered that Myers had been run over.

Near the point where Myer's body was found, the overhead trolley wire, which supplied the current to the electric motor car, passed over the tracks at a height of five feet seven and one-half inches from the rail, making it necessary for a man of ordinary height to remain seated in the car or stoop down. There was no light near this place.

The headlight on the motor car was defective and was not burning.

The case was submitted to a jury and a verdict was had by Myers' widow.

The verdict was reversed by the circuit court of appeals.

The supreme court reversing this holding after stating the facts, said, in part:

> "The opinion of the Circuit Court of Appeals placed the reversal largely upon **the want of definite proof as the manner in which Myers came to his death—whether by contact with the wire, or if so, whether that merely disabled him or he was only injured or stunned by the fall, was seized with vertigo or other sudden sickness and fell from the car for that reason, or lost his footing by some unexpected movement of the train, or voluntarily got off the car and stumbled and fell upon the track, or became bewildered in the dark, and mistakenly supposed himself to be in a place of safety. The court held that all these situations were more or less probable, and in the absence of some accurate means of ascertaining the true condition in this regard, no recovery could be had for the wrongful causing of his death, and that an examination of the testimony brought the court to the conclusion that the jury should not have been permitted to guess as to the proximate cause of death.** * * *

"Considering the testimony, as it must be considered in determining questions of this character in appellate courts, in its most favorable aspect to the plaintiff below, we think the jury might well have found, in view of the place at which the body of Myers was found near to the wire, with his cap gone from his head, that he came in contact with that wire and was thrown to the ground, and that he survived from contact with the wire, carrying the voltage which it did, and while in this situation, he was run over and killed by the approaching motor car, the operator being unable to see his body upon the track because of the want of efficient light in the entry or in the motor car. We think reasonable men, considering the testimony adduced, might well have come to this conclusion, and that it was error in the appellate court to set aside the verdict for entire absence of testimony upon this subject. In our opinion, the trial court properly left the question to the jury upon the testimony which, when fairly considered, might sustain the verdict."

In the case of *Railway Company* v. *Howard*, 79 Ga. 44, the court said:

"The question of what is ordinary care and what is negligence is exclusively for the jury, and the court in this charge takes this question from their consideration. * * * The court cannot instruct the jury what a prudent man would do; for in legal contemplation, the jury knew it better than the court. If instructions on that subject had to be given, the jury would be the instructors and the court the instructed; that is, the jury would charge the judge on that part of the case, rather than receive a charge from him. It is not for the court to teach the jury the ways of the prudent man, but to warn them of the duty on the part of all others to make their ways like his.

The court cannot point out to the jury specifically the ways of the prudent, the law supposing those ways better known to the jury than to the judge."

II.

The petitioner presents for its second proposition the contention that Ferguson was guilty of negligence which was the sole cause of his death.

A detailed answer to this proposition would consist largely in a re-hash of what has been said in answer to petitioner's first proposition. Under this proposition the petitioner presents argument that inasmuch as the jury found that Ferguson was blinded by the glaring head light, that it contradicts the finding that the negligence in failing to ring the bell was the proximate cause of Ferguson's death. This argument ignores the well established doctrine that there may be more than one proximate cause of an injury, especially where those causes are not inconsistent.

We emphasize the statement that there is no inconsistency in the finding, by calling attention to the fact that the evidence was sufficient to have justified the jury in finding that Ferguson had been engrossed in his work between two cars, and not being advised of the approach of the train by the customary sharp ringing of the bell, stepped away from the standing cars, and met the glare of the headlight, which blinded him, and caused him to become confused, thereby causing him to stumble into a position of danger, or prevented him from appreciating the distance he was from the track, and the distance the approaching train

was from him—in other words, that the failure to ring the bell, and the glare of the headlight operated as two proximate causes of him being injured.

In this connection we call attention to the fact that the locomotive was being operated in violation of the National Safety Appliance Laws, and the applicable rules of the Interstate Commerce Commission, in that the headlight on the locomotive that struck Ferguson was not "diminished in the yard and at the station." The applicable rules of the Interstate Commerce Commission after requiring the use of certain designated headlights on road engines, provides in Section (C):

> "Such headlights shall be provided with a device whereby the lights from same may be diminished in yards and at stations, or when meeting trains" (R. 179).

Section 131 of the said rules of the Interstate Commerce Commission provides the character of lights that shall be used on engines engaged in switching service in the yards (R. 179).

The engineer testified (R. 123) that he had a bright headlight which was provided with a dimmer, but says:

> "I did not cut out my light or dim it in any way in going through the yards, I had a bright burning light."

The testimony was conclusive that the light was not dimmed.

It was shown (R. 85) that with a bright headlight such as described, that when the engine got within 200 feet of a person, if he looked toward it, it would blind him so that he would not know or could not see what he was doing. That it would prevent him from telling how far the train was from him.

> "If it was burning full bright, it blinds them, he just can't see."

There was quite a bit of uncontroverted testimony on this point conclusively establishing the well known fact that an undimmed headlight when it gets reasonably near to one, has the effect of suddenly causing temporary blindness, and producing a state of confusion. This is common knowledge.

We submit that inasmuch as the petitioner was confessedly violating the Safety Appliance Laws, and that there was sufficient evidence to sustain the jury finding, that such operated as a proximate cause of Ferguson's death, that in any event, the judgment of the trial court should be sustained, because contributory negligence, if any, does not apply where the injury is caused in whole or in part by the violation of the safety appliance laws, or the applicable rules of the Interstate Commerce Commission thereby authorized (*Union Pac. Ry. Co.* v. *Huxoll*, 245 U. S. 535).

III.

Petitioner's third proposition contends that Ferguson met his death as the result of a risk assumed by him.

In support of that proposition, the petitioner presents some general statements of the law relative

to assumed risk, but it is believed they are wholly inapplicable to this case. The jury found that Ferguson's death was caused by negligence of the petitioner in failing to comply with its self imposed duty of ringing the bell as the train passed through the yard. No complaint is made in this court of that finding.

There being no contention that Ferguson knew of the dangerous proximity of the train, in time to have avoided being injured by it, it is confidently believed that the issue of assumed risk was not raised; but, if it was in fact raised, it was certainly an issue of fact to be determined by the jury, and having been so determined adversely to the petitioner, there is no merit in its contention.

We feel somewhat disposed to apologize for calling attention to the fact that it is the well established doctrine of this court, that one does not assume the risk of injuries resulting from negligence unless he knows of the particular negligence, and appreciates the danger to him, or the negligence is so open and obvious that in the discharge of his own duties he would have become apprised thereof, and appreciated the danger arising to him therefrom.

Gila Valley Ry. Co. v. *Hall*, 232 U. S. 94.
McGovern v. *Phil. & R. R. Co.*, 235 U. S. 389.
Sea Board Air Line Ry. Co. v. *Konnecke*, 239 U. S. 353.

IV AND V.

Under the above heading the petitioner contends that the Supreme Court erred in failing to reverse outright the judgment of the District Court, and in reversing the judgment of the Court of Civil Appeals.

These contentions have been so fully and completely answered in our answer to preceding propositions presented by the petitioner, that we deem it unnecessary to discuss them further.

VI.

Petitioner's sixth proposition contends that the Supreme Court of Texas failed to follow the rules of law established in the Federal Courts in construing the Federal Employer's Liability Act.

We do not find any warrant in the record for this charge made against the Supreme Court of Texas.

We very readily agree that the applicable decisions of the Supreme Court of the United States, control the rights of the parties to this suit insofar as the points have been passed upon by the opinions of this court. However, we call attention to the fact that the rights of the parties have been ruled by the applicable decisions of the Supreme Court of the United States, and that we have relied upon those decisions for our contentions in this case.

Sustaining our contention that the evidence was sufficient to support the jury finding that Ferguson had been working between the cars of the freight train that was being made up when the passenger train approached, and that he suddenly stepped from between those cars and come in position to be struck by the freight train, we have cited:

Myers v. *Pittsburg Coal Co.*, 233, U. S. 184.
Marande v. *T. & P. Ry. Co.*, 184 U. S. 173.
Choctaw & G. Ry. Co. v. *McDade*, 191 U. S. 64.

To sustain our contention that contributory negligence was an issue of fact for the jury, we have relied upon:

Railway Company v. *Stout*, 17 Wallace, 657.
Richmond & Danville Railway Co. v. *Powers*, 149 U. S. 43.
McDermott v. *Severe*, 202, U. S. 600.
Kreigh v. *Westinghouse, etc. Co.*, 214 U. S. 249.
Sea Board Air Line Ry. Co. v. *Konnecke*, 239 U. S. 353.

Supporting our contention that the issue of assumed risk was correctly determined against the petitioner, we have cited:

Gila Valley Ry. Co. v. *Hall*, 232 U. S. 94.
Union Pac. Ry. Co. v. *Huxoll*, 245 U. S. 535.
McGovern v. *Phil. & R. R. Co.*, 235 U. S. 389.
Sea Board Air Line Ry. Co. v. *Konnecke*, 239 U. S. 353.

We respectfully submit that this case was correctly disposed of by the Supreme Court of the State of Texas, and we pray that the petition for certiorari be in all things denied.

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Attorneys for Respondent, Franklin Jones, Administrator.

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No. 349.

In the Supreme Court of the United States

OCTOBER TERM, 1927.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

VS.

FRANKLIN JONES, ADMINISTRATOR OF THE ESTATE OF D. R. FERGUSON, DECEASED, RESPONDENT.

WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS GRANTED.

BRIEF OF RESPONDENT.

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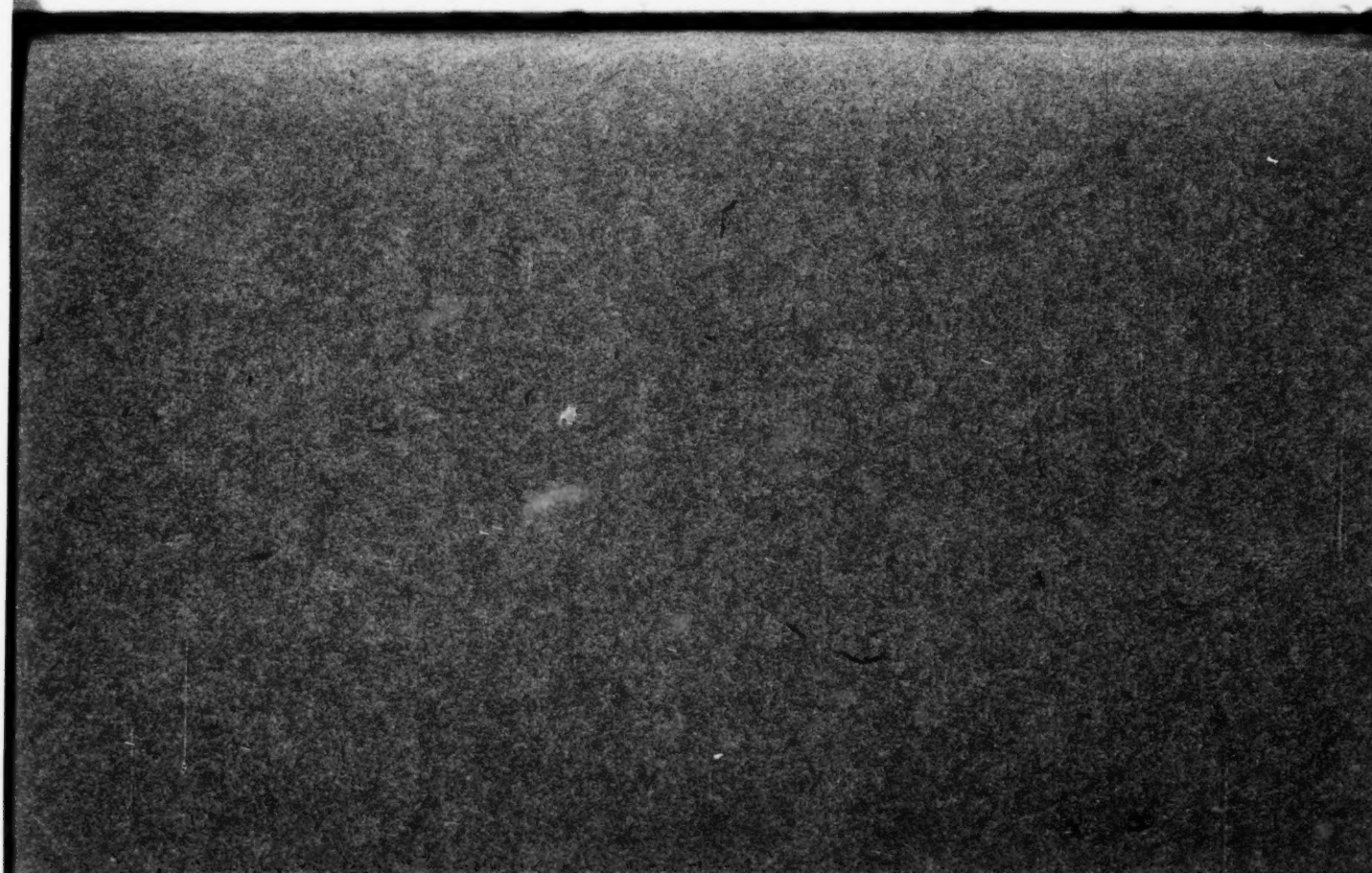

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FRANKLIN JONES, ADMINISTRATOR OF THE ESTATE OF D. R. FERGUSON, DECEASED, RESPONDENT.

WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS GRANTED.

FOREWORD.

Where a maximum amount of efficiency of a car inspector is sought, by the master inducing him to rely upon the sharp sound of the bell to warn him of the approach of a train, injury caused by the breach of this implied contract of protection, justifies the jury in finding negligence, and acquitting the servant of contributory negligence.

GENERAL STATEMENT.

The respondent filed a brief resisting the petition for certiorari. The writ having been granted, the respondent presents this brief supporting his contention that the judgment of the Supreme Court of Texas should be affirmed.

The Court of Civil Appeals of Texas rendered three opinions in this cause. It first reversed the case upon the sole ground that the deceased was guilty of contributory negligence as a matter of law, and that the damages should have been diminished (R. 180). It then granted respondent's motion for rehearing, and held that the question of contributory negligence was an issue of fact correctly determined by the jury and affirmed the judgment of the trial court (R. 237). It then granted petitioner's motion for rehearing and in a majority opinion (the Chief Justice dissenting) returned to its first opinion (R. 244).

The Supreme Court of Texas granted a writ of error, and held that the deceased was not guilty of contributory negligence as a matter of law, but that it was an issue of fact, and that the second opinion of the court of civil appeals which affirmed the judgment of the trial court was correct, and it accordingly adopted that opinion, and reversed the court of civil appeals, and affirmed the judgment of the trial court (R. 326).

The respondent contends that the evidence was sufficient to justify the jury in finding that the petitioner

was guilty of negligence in several particulars which caused the injury, especially in failing to ring the bell, and that deceased was not guilty of contributory negligence. We feel that if this court shall so conclude, that it will not be interested in determining the question of procedure as to whether the Supreme Court of Texas correctly granted the writ of error. But believing as we do that the petition and brief for certiorari does not fully and fairly present the facts in this case, and that the facts when fairly considered sustain the findings of the jury as approved by the Supreme Court of Texas, establishing liability of the petitioner, and acquitting the deceased of contributory negligence; tedious as it may appear, we feel it our duty to present in this brief, somewhat fully, the testimony upon which we rely.

The Supreme Court of Texas held that the verdict of the jury establishing negligence of the petitioner in failing to ring the bell which operated as a proximate cause of the death of deceased, and the verdict of the jury acquitting the deceased of contributory negligence, were sustained by the evidence as issues of fact; and that therefore the judgment of the Court of Civil Appeals of Texas holding that the deceased was guilty of contributory negligence as a matter of law, should be set aside, and the judgment of the District Court of Bowie County, Texas, should be affirmed. Accordingly, judgment was rendered by the Supreme Court of Texas in favor of the respondent so disposing of the case.

We contend that when viewed in the light of the well-known duty to make a very careful inspection of the cars before sending a train out on the road, it is apparent

that the self-imposed custom, of the master causing the bell to be rung to sharply and decisively warn the car inspector of the dangerous proximity of a train, amounts to an implied contract to procure a high standard of inspection, as well as a maximum amount of work, by relieving the inspector of the burden of keeping constantly in mind the necessity of keeping a lookout for the approach of trains. It plainly enables the inspector to give not only his whole time to the work of inspection, but more important, the concentration of undivided thought.

While this court will probably dispose of this case on its merits as shown by the record, without concerning itself with whether the Supreme Court of Texas correctly assumed jurisdiction, and reviewed and reversed the decision of the court of civil appeals; nevertheless we feel it our duty to direct attention to an erroneous position taken by the petitioner, in its petition for certiorari, with reference to the statutes of Texas.

We regret to find it necessary to refer to the fact that the petition for certiorari page 5, contains an erroneous statement of the Statute of Texas regulating the jurisdiction of the court of civil appeals of that state. The language contained in the petition for certiorari being:

> "It also appears that under the Statutes of Texas 'the judgments of the courts of appeals shall be conclusive on the law and the fact' (Complete Texas Statutes 1920, Article 1591)."

It is believed that the plaintiff in error should have corrected this erroneous statement, for it is an in-

correct statement of the statute. Said statute provides (Complete Statutes of Texas, 1920, Art. 1591, Texas Revised Civil Statutes 1925, Art. 1821):

> "The judgments of the court of civil appeals shall be conclusive on the law and fact, nor shall a writ of error be allowed thereto from the supreme court in the following cases to-wit:"

Then follows a list of cases in which such judgment is final, but none of which embrace a case of the kind we are now dealing with. Said list being:

1. Any civil case appealed from a county court etc;
2. All cases of Boundary;
3. All cases of Slander;
4. All cases of Divorce;
5. All cases of Contest at Election etc;
6. Interlocutory orders appointing Receivers etc;
7. Where Appellate Jurisdiction is not given to the supreme court etc.

It is believed that any Texas lawyer should know that this case does not come within the provision making the judgment of the Court of Civil Appeals of Texas final, but is within the provision of Article 1728, Texas Revised Civil Statutes of 1925, which gives to the Supreme Court of the State of Texas, the right to review errors of law committed by the court of civil appeals, and in accordance with which provision the Supreme Court of Texas granted the writ of error, and reviewed the judgment of the court of civil appeals in this case. Therefore if this court shall conclude from the evidence that the deceased was not guilty of contributory negligence as a matter of law,

but that it was an issue of fact, it will respect the verdict of the jury acquitting him of contributory negligence, as adopted by the decision of the Supreme Court of the State of Texas, affirming the judgment of the trial court.

It is confidently believed that the statement made by the petitioner, page 5 of its petition for certiorari, that:

> "The essential facts upon which the court of appeals made its finding that the decedent was guilty of negligence proximately contributing to his death, are not in dispute," is incorrect—certainly it can not be considered a fair statement of the record.

Inasmuch as we can not agree with the statement of the petitioner as to the evidence, and the conclusions reached by it therefrom, we will present from the record sufficient testimony to support our contention.

STATEMENT.

There was sufficient evidence to support the finding that the whistle was not sounded and the bell was not rung.

The witness, Mrs. Ona Carlisle testified (R. 76):

> "The bell was not ringing, and the whistle was not blowing before it left my house, nor after it passed my house, and it didn't ring and no whistles were blown until after it stopped."

Rupert Ferguson, who was at home about even with where the deceased was killed, testified (R. 99):

> "As the passenger train passed my place going into the station, the bell wasn't rung, and the whistle had not blown before it passed our place."

Jewell Lewis, testified (R. 88):

> "The whistle was not blown that night as the train came into the Leesville yard, nor was it blown between the stations of Staples and Leesville. The reason I am so positive of this is we were waiting outside of Mr. Brogmans for the train to whistle for Leesville as we were intending to start for home upon hearing the whistle."

She also testified (R. 89):

> "As stated the bell on the engine was not rung at any time that night as the train came into the station of Leesville, and my reason for saying this, is, as previously stated, we were sitting in a car out in the road in front of Mr. Brogman's house, waiting for the train to whistle for Leesville when we expected to start for home; therefore, my attention was directed to the train coming in, and situated as I was, I know I would have heard the bell had it been ringing."

It was customary for the bell on the passenger engine to be sounded, as the train passed through the Leesville yard to warn car inspectors and other employees of the dangerous proximity of the train; in fact it was conceded that it was petitioner's duty to do so.

Andrew L. Cox, a witness produced by the petitioner, testified (R. 132):

> "I knew that they made up freight trains there in the yard both day and night, and I knew that it was necessary to ring the bell as I went in there to warn the brakeman or car repairers and car inspectors, or whoever might be near the main line, to enable them to avoid getting hurt."

L. Polete, a witness for petitioner, testified (R. 126):

> "It is customary for me to blow my whistle about a quarter of a mile south of Leesville, that is, from the depot, and it was customary for me to ring the bell as I went through the yards and into the station at Leesville; in other words, the bell would start ringing at the south end of the yards and on into Leesville station, that was customary; our rules required the bell to be rung along in that place, that is why it rang along there."

The same witness (R. 127) testified:

> "It was necessary to ring the bell as I went through Leesville to give warning to any people who might be working in the yard, that was the purpose of ringing the bell, so as to sharply attract the attention of the people that might be there and let them know that the train was coming, that was the idea."

W. R. Proud, a witness for petitioner, testified (R. 130) bottom of page:

> "The idea of keeping the bell ringing was to apprise car inspectors and everybody else in the yards that a train was going through the yard, that the train was approaching—in other words, it is a separate and distinct noise from the noise of the train, and you can hear the bell above all that, it is a distinct noise of itself and is a warning of the presence of the train."

The evidence justified the jury in finding that deceased was actively inspecting the cars of the freight train that was being made up, and was not guilty of contributory negligence.

L. E. Crawford, a witness for the petitioner testified (R. 145):

"If I remember right about twelve or fifteen cars had been thrown down to the caboose up to the time the passenger train came in, may be not that many, or may be more."

The witness, T. H. Burke, testified (R. 135):

"After I saw Mr. Ferguson, I put some cars on this passing track, I put all of them that I ever put in there on the track after that time. The best I can remember we had been away from there about twenty or twenty-five minutes when the plug came in that night." (The "plug" referred to by this witness was the passenger train that killed Ferguson.)

Travis Barnhill, testified (R. 104) that he and Reed Holton while walking down the railroad track going south from the depot at Leesville, passed the deceased, and at the time he was standing near the end of cars which were attached to the caboose on the passing track, and that his lantern was setting on the ground. That they walked slowly and travelled about one-half mile before they met the passenger train. He says on page 105:

That it couldn't have been over fifteen minutes after he passed deceased, that he met the passenger train.

A. H. Thorla, testified (R. 111):

That a short time before the passenger train came in, he passed near the north end of the cars which were on the passing track.

"As to how close to the north car I passed it was thirty or forty feet; I was east from the north end of the car when I passed it. I didn't cross the track there, I went up the yard further north. When I passed that car that I spoke of I saw Mr. Ferguson walking around there."

This witness also testified as to the distance he travelled before the passenger train came in (R. 112) which would indicate that it was some four to ten minutes between the time he saw Ferguson and the time the passenger train came in.

Nick Franklin, the car inspector who went on duty after Ferguson was killed, testified (R. 94):

> "There were about fifteen cars on that train south of where Mr. Ferguson's body was found, I suppose, something like that, and all of those cars had the air hose connected up, but the air hose on the cars north of his body had not been coupled up."

M. J. Miller, a witness for the petitioner, testified to finding Ferguson's lantern (R. 161) a few minutes after he was killed:

> "The lantern was facing the cars on the side, or passing track—facing east in other words, seventy-seven feet south of Mr. Ferguson's body, and I took the lantern down there and saw that he was dead."

This witness also testified (R. 162):

> "The first piece of flesh found was about 40 feet from the lantern, about the size of the end of your thumb, and from there on up you could see where his body had been rolled; a little more than half way from the lantern to the body is where I found this flesh; that was the first place where I found any sign of where the body had dragged or rolled, and there was evidence of dragging and rolling all the way down from that point on down to where the body was."

A. S. Cox, fireman on the engine that killed Ferguson, testified (R. 132 and 133):

> "I saw some cars there on the railroad track east of the light, they were on the next track east of my track. I never worked as a car inspector. I do not recall where that light was with reference to the north end of that string of freight cars, I have no idea, I just know it was somewhere along the cars. I don't know whether it was at the opening between the cars where they are coupled together, or alongside of the cars. The light was not facing us exactly, it was facing toward the passing track, but I could see the side of it, and my idea was that it was facing those cars on the sidetrack, that is the way it impressed me."

L. Polete, engineer on the train that killed Ferguson testified (R. 124):

> "I did see a lantern in the yard there at Leesville, I saw a car repairer's lamp sitting on the ground between the tracks, between the main track and track number one, supposed to be the passing track, but I did not see Mr. Ferguson."

Again he testifies (R. 126-127) with reference to this light:

> "There were a string of freight cars and box cars east of that light. That was a track on which they frequently made up trains."

A. L. Cox testified (R. 132) with reference to keeping a lookout:

> "I went right on by it, and into the station, and did not see anybody. I saw some cars there on the railroad track east of the light, they were on the next track east of my track."

The engineer on the passenger train testified that he kept a lookout and saw no one on the track or near the inspector's lamp—saying (R. 124):

> "In approaching and going through that yard I was keeping a lookout; I kept a lookout in the yards, and also along the lines that I travel on. I did not see Mr. Ferguson or any other man on or near the track in going through those yards that night. I did see a lantern in the yards there at Leesville, I saw a car repairer's lamp sitting on the ground between the track, between the main track, and track number 1, supposed to be the passing track, but I did not see Mr. Ferguson or any other man there about the lantern, no man about this light whatever."

He also testified (R. 127):

> "It was my duty in going into Leesville to keep a lookout in front of my train for any obstructions that might be on the track, or anything of that kind, and if there were any persons on or about the track, it was my duty to blow the whistle and warn them that they were in danger."

Petitioner makes the contention that deceased had no duties to perform on the west side of the cars. It is a matter of common knowledge that both sides of the cars must be inspected and the witness, R. L. Morgan, testified (R. 159):

> "If there is no crew down there, there is no reason why he wouldn't be on the west side if he wanted to, but it is not convenient for them to work on the west side while the train crew is actually working in putting cars on the caboose, but while the train crew is off some other place they can work on the west side just as well as on the east side. For instance, if there is 15 cars

> in there, and he has to connect up the hose, he can do it on either side while they are away, there is nothing to keep them from either side; he could inspect it and connect up his air hose, and it would make no dfiference which side he worked on while the engine was away."

Nick Franklin, a car inspector of many years experience testified with reference to the manner in which a train is inspected as it is being made up as follows (R. 94):

> "The usual practice of inspecting the train was that we would go up each side, up one side and down the other, and make a general inspection of the cars and test the air, and see that it was all right, and inspect the safety appliances, I inspected this train in that way on that night."

He also testified (R. 95):

> "In making the coupling of this air, after finishing that, he would step out between the tracks, and go up to the next coupling and do the same thing, and then step out, that was the customary way in which it was done."

He also testified (R. 95):

> "The inspector would make light repairs; if he found light defects he would repair them, and in the process of his work he would keep on building the train up as I have described until it was finished."

Franklin also testified (R. 95) that in his judgment with cars on both tracks, there would be a free space of four or five feet.

Franklin testified (R. 115) that it was customary for the inspector to set his lamp down where it would shine on the coupling between the cars and then couple the air hose.

> "With reference to moving away from the opening between cars after coupling the air hose, and inspecting the safety appliances, and the distance that they would move away from the car after having made said inspection, he would step back in the clear from the train that was being made up; I would say that he would ordinarily move back several feet, maybe two, or three or four feet. A person making the inspection of a train that way, would move away from the standing cars about 2 or 3 or 4 feet, step back in the clear several feet, that is the practice and habit of inspectors."

Cox, the fireman on the passenger train that killed Ferguson first learned that Ferguson had been killed when the train reached Many, some distance north of Leesville, and inspected the pilot and testified (R. 97):

> "I saw blood on the pilot beam, on the ribs of the pilot or cow catcher, and on the step on the right side of the engine. The blood was all over the pilot beam, scattered different places, and in spots, on the right hand end of it, that is the engineer's side of the engine, it was all over the end of it, scattered around in different places, on the front of it."

G. W. Lillie, master mechanic at Shreveport, testified with reference to the height of the pilot beam of the engine that injured Ferguson (R. 175):

> That it was ten feet long, 41½ inches from top of pilot beam to the top of the rail, 5 inches from the top of the rail to the top of the tie and six inches the width of the tie. A total of 52½ inches.

The deceased had been a car inspector for petitioner at Leesville for some 10 or 12 years, and was faithful and competent in his service as disclosed by the testimony of his foreman, C. S. Allen, who testified (R. 157):

> "Mr. Ferguson was car inspector under me about two years and six or eight months; he was never laid off during that time, and there was never a black mark against his work during that time; I never so much as had a criticism against his work, that I can recall."

NOTE. This evidence was sufficient to sustain a finding that the freight crew placed 15 cars against the caboose 20 or 25 minutes before deceased was killed; and that he was standing at the north end of these cars waiting to see if other cars would be presently sent down, when Barnhill and Holten passed him 15 or 20 minutes before he was killed. That his lamp having been found 77 feet south of his body, with signs that his body had been dragged or rolled a great part of this distance, and that Nick Franklin, the car inspector found the cars south of his body coupled, and that the engineer and fireman though keeping a lookout did not see him, that he was engaged in work between the cars with his lamp on the ground facing the coupling, and that he came from between the cars after their vision had passed beyond

his lamp; and by reason of the failure to give the customary warning by ringing the bell, which he had formed the habit of depending upon, his attention was not drawn to the near approach of the train, and he stepped near enough to the main line to be struck by the pilot beam; at best, there was a free space of only 6 feet—less than 2 steps would have brought him in the path of the pilot beam.

It is clear that the jury had the right to believe that Ferguson had placed his lamp upon the ground, and had gone between the cars to do some work, and was not in view of the engineer and fireman as they approached his lamp, and that he was not at the end of that string of cars when struck by the train.

He was last seen with his lamp in his hand near the end of the cars, and he certainly carried the lantern back 77 feet about 2 car lengths, and placed it on the ground, and apparently his body was struck at that point, knocked 40 feet and then rolled on the ground 37 feet, for Nick Franklin found the cars coupled and the air hose connected from his body south to the caboose; and as the engineer and fireman observed that there was a string of cars alongside the lantern and to the east thereof, the jury certainly had the right to conclude that he had gone south alongside those cars, had passed between them, and was thus out of view of the engineer and fireman; and so located and engrossed with his work as that he did not notice or become apprised of the approaching train, and its close proximity, but

would have done so and avoided the injury had the bell been ringing as was its custom, and as he had the right to expect—the wound on his torso was about the height to have been caused by the pilot beam.

It is confidently believed that there was also sufficient testimony to justify the jury in finding that the bright headlight aided in preventing him from keeping clear of the train, by confusing him when he unexpectedly came in its path as he stepped from between the cars.

REMARKS.

The importance to the traveling public and the employees of the railway company of the car inspector carefully and faithfully performing his duties, is so great that his duties should be discharged under the most favorable surroundings, and with the view of his mind being concentrated on that particular work.

The petitioner seems to have fully appreciated this, for instead of requiring the inspector to depend upon his knowledge of the time the train would pass, it required that trains passing along where inspectors might be engaged in their work, should ring the bell to ~~shortly~~ sharply apprise them of their approach.

The necessity of that self-imposed custom and duty being discharged, must be apparent to any one, and the failure of its performance was sufficient to authorize the jury to find that it constituted a negligent breach of duty owing to the inspector.

It is believed that it should be apparent to any one that where a person who is required to so fully and carefully inspect cars, has become accustomed to rely upon the warning given by the sharp distinct sound produced by ringing the bell, that the failure to perform that duty, constitutes negligence that is liable to result in just such an injury as we have here.

The petitioner contends that the violation of the custom of ringing the bell, did not constitute negligence proximately causing this injury; arguing that the deceased might have ascertained the presence of the train in other ways than through the warning given by the bell, but inasmuch as it imposed upon itself the duty to ring the bell, the man for whose benefit it was to be rung, was entitled to the chance of avoiding injury by its warning.

The petitioner contends that the deceased saw the bright headlight, and thereby knew of the approach of the train. The jury was authorized in finding that if he was blinded by the headlight, that it was at such time and place, and so near as to confuse him, and that had the bell been sounded as was the custom, the near approach of the train would have been discovered, and his death avoided.

The attorneys for the railway company in their brief discuss the ability of Ferguson to have ascertained the approach of the train by hearing the noise or seeing the headlight, as if watching for trains was the major portion of his duty. It is not difficult for attorneys who sit in their office, to satisfactorily the-

orize as to how Ferguson could have easily discovered the approach of the train. It is not difficult for those who have never engaged in work in railroad yards, or even studied the duties and responsibilities of car inspectors in connection with their opportunity to discover the approach of trains, to satisfy themselves that the noise of an approaching train or the headlight is sufficient warning of its approach, and that the car inspector who relies upon the customary sharp decisive warning of the ringing bell, must be held to have been negligent in failing to discover the approach of the train; but while this same theorizing sometimes is found to prevail in the minds of the judiciary, who are equally ignorant of the duties and responsibilities of car inspectors, nevertheless to one familiar even as a spectator with the manner in which the work of these men must be done, and the responsibilities that rest upon them, it is easy to realize that they are entitled to the customary warning that has been adopted by ringing the bell to warn them of the immediate approach and dangerous nearness of the approaching train; hence it is wise to leave these matters to a jury as being best qualified to pass upon the issue of contributory negligence.

It does seem that it ought to be a matter of the commonest knowledge that the work of a car inspector who is inspecting a train that is being made up, is of very great importance, and that his whole soul should be concentrated in that work, both for the expeditious dispatch of the business of the master, and for the

thoroughness of the inspection for the protection of the travelling public, and the other employees of the common master; but if there is doubt about the matter, we only have to look to the testimony of the witness, T. H. Burke (R. 137, who testified in substance that the only man in the railroad service upon whom rests a burden so great for the safety of the trains, and the travelling public and employees generally as the car inspector, is the dispatcher who keeps the trains from coming into collision as they are being operated over the road.

It seems to us that it is axiomatic that the work of the car inspector is of so much importance—that so much depends upon its intelligent and faithful performance, that everything practical should be done to permit, in fact cause him to discharge his duties under the most favorable circumstances, and to relieve him insofar as it is possible from the necessity of assuming the responsibility of carrying other matters in his mind than the careful and faithful inspection of the cars. The petitioner doubtless viewed it from that standpoint when it inaugurated the self imposed custom and duty of causing the engine bell to be sounded as the trains pass along where the car inspector is engaged in his work—thus advertising to him that he may only carry in his mind the subconscious thought that if a train approaches and reaches the danger zone—gets near enough to endanger his safety while he is performing his work, that he will be advised thereof by the sharp ringing of the bell which all of the witnesses

who speak upon the subject say, is a separate independent warning which can be heard above all the other noises, and apprises him of the dangerous approach of the train.

We do not agree with the following contention in the petition for certiorari, page 5:

> "The essential facts upon which the court of appeals made its findings that decedent was guilty of negligence proximately contributing to his death, are not in dispute."

In fact—the contention of the court of civil appeals is not supported by the record. That court theorized without evidence to support it, that the deceased was sitting or squatting near the main line, and negligently failed to discover the approach of the train or to leave his place of danger; notwithstanding the testimony of the engineer (R. 124), and of the fireman (R. 132), was that they were keeping a lookout, and the deceased was not on or about the track as the train approached the inspector's lamp. The contention of the court of civil appeals is in fact in direct conflict with this testimony, and is contradictory of the theory on which the case was tried.

It was contended—in fact apparently not disputed, that the deceased came somewhat suddenly into the path of the train. This is emphasized by the declaration of the petitioner in its motion for rehearing in the court of civil appeals filed February 26th, 1926 (R. 220), where on page 223 R., it says in said motion for rehearing:

> "The evidence circumstantially, and without dispute, shows that the deceased suddenly, and at a time when he could not—been seen by the engineer or fireman, brought himself in such proximity to the track upon which the train was being operated, as to cause him to be struck and killed by the same."

It is certain that there was an abundance of testimony in the record to contradict the theory that the deceased was in a sitting position on the main line track, or near it as the train which killed him approached—in fact it is believed that the great preponderance of the evidence clearly shows as was contended throughout the trial of the case, and the presentation of it in the court of civil appeals, that the deceased was struck while in an upright position by the pilot beam of the engine, and his body knocked a distance of some 30 or 40 feet before it struck the ground, and then rolled some 35 feet further.

Bearing in mind that deceased was last seen alive (R. 111) walking along side the cars, and near the north end thereof, just a few moments before he was killed, and that the engineer and fireman saw the lantern along side and facing those cars, and did not see deceased, and that his body was found at the north end of those cars 77 feet from the lantern, with unmistakable evidence that it had been rolled a great part of that distance, the jury was justified in finding that he had passed 77 feet, practically two car lengths, south along side those cars after Thorla saw him, and that he placed his lantern on the ground to shine upon

the coupling while he passed between the cars to do some work; and depending upon the sharp noise made by a ringing bell, he stepped from this position and came in the path of the engine, without realizing its dangerous approach, and that he probably was also confused by the bright headlight which aided in causing him to be struck.

We summarize the testimony supporting these findings of the jury:

One looking into a bright headlight such as this engine carried, is momentarily blinded; witness, Nelson, R. 85; witness, Franklin, R. 116. Thorla saw him near the end of those cars with his lantern in his hand only a few moments before he was killed (R. 111).

The engineer, R. 124, the fireman, R. 132, saw his lantern on the ground along side the cars, and though keeping a careful lookout, did not see deceased.

The body was found 77 feet north of the lantern with marks on the ground between, justifying the jury in finding he was struck at the lantern (R. 161).

Nick Franklin, the car inspector who took up the work where deceased left off, found all the cars south of his body coupled, and the air hose connected (R. 94). It was customary for the car inspector when coming from between cars to step back several feet toward the main line (R. 116).

It was not unusual for a car inspector to do his work of inspecting cars on that track on the west side thereof, and between those cars and the main line (R. 159).

In this connection we are not unmindful that the petitioner contends that the deceased was wrongfully on the west side of the freight cars, but in this respect it makes the mistake so often made in its brief, of assuming that testimony offered by it, should be accepted as true and final, though contradicted by reputable witnesses. This theory is contradicted by R. L. Morgan, a witness produced by it, who testified (R. 159):

> "If there is no crew down there, there is no reason why he wouldn't be on the west side if he wanted to, but it is not convenient for them to work on the west side while the train crew is actually working in putting cars on the caboose, but while the train crew is off some other place they can work on the west side just as well as on the east side. For instance, if there is 15 cars in there, and he has to connect up the hose, he can do it on either side while they are away, there is nothing to keep them from either side; he could inspect it and connect up his air hose, and it would make no difference which side he worked on while the engine was away."

The jury had the right to accept all of this testimony, though some of it may have been contradicted. If accepted it showed that deceased went from where Thorla saw him some two car lengths (77 feet) south along side those cars, and placed his lantern upon the ground, for Nick Franklin found all cars south of his body coupled and the air hose connected; this could not have been if any part of the string of cars south of his body had been brought in after he was struck.

Inasmuch as this evidence was sufficient to show that the deceased was between the cars at the point

where his lantern was found, and for that reason was not seen by the engineer or fireman, the jury had the right to find, that depending upon the customary practice of the bell being rung to warn him, the deceased stepped into the path of the train after the fireman and engineer had ceased to look at that part of the track where he had placed his lantern. This is especially true in view of the fact that most of the material evidence showing and tending to show these facts, was furnished by witnesses produced by the petitioner.

The jury was justified in finding that Ferguson stepped from between the cars where he was working, after the engineer and fireman had ceased to observe the track in front of them, and that being misled as to the distance of the approaching train, by reason of the custom of ringing the bell not having been followed, and probably confused by the bright headlight, he accidentally came in the path of danger and was struck by the pilot beam and killed.

The question of whether Ferguson was guilty of contributory negligence, could not be resolved against him as a matter of law, but if raised by the evidence, was an issue of fact for the determination of the jury, and if so, this court will not be concerned with the disposition of that issue of fact by the jury, and approved by the Supreme Court of the State of Texas; therefore, the theory that Ferguson was guilty of contributory negligence as a matter of law, insisted upon by the petitioner, is without merit.

Considering the other contention of petitioner, namely: That Ferguson met his death as the result of

a risk assumed by him, we really fail to appreciate the force of petitioner's contention. It has been determined by the jury, and by the Supreme Court of the State of Texas, that Ferguson met his death as the result of negligence—in that petitioner failed to comply with the custom which it had voluntarily established of ringing the bell as that particular passenger train passed through the yard at Leesville, as a means of safety to the car inspectors, by bringing sharply to their attention, that the approaching train was dangerously near. There is no contention that this custom had ever been breached before the time Ferguson was killed, and certainly Ferguson did not assume the risk of dangrs presented through the negligence of his master—not having any notice of even a remote probability of such negligence.

When one considers the manner in which Ferguson's duties were discharged, and the necessity of prompt performance in getting out the freight trains of the master, the necessity for establishing the custom of through trains ringing the bell as they passed along where his work was to be done, becomes manifest, but we are not dependent upon the wisdom of this requirement being visited upon the master, for it appears without controversy, that the petitioner had voluntarily established that custom as a means of protection to men engaged in the very work in which Ferguson was engaged (R. 130 bottom of page). Certainly the petitioner could not establish a custom or usage for the benefit of Ferguson, and then contend that Ferguson assumed the risk of it not discharging the voluntary burden it had assumed. In other words, it cannot be

reasonably contended that Ferguson should have anticipated that the master would be negligent in the very particular of violating a custom which it had established for the protection of the very person who was injured by the negligent breach of that custom.

Ferguson did not assume the risk of injuries due to the master's negligence, unless he knew of the negligence and appreciated the danger to himself therefrom in time to, in the exercise of ordinary care, have avoided injury. This doctrine is axiomatic and is fully discussed in *Gila Valley Railway Company* v. *Hall*, 232 U. S. page 94.

There being no contention that Ferguson knew, or had any reason to anticipate negligence such as resulted in his death, the doctrine of assumed risk was not a question at issue in the case, but certainly if it could possibly be contended that it was raised by the evidence, it was an issue of fact which the jury has in its prerogative resolved against the master, and its decision is final.

Inasmuch as it was conceded by both the plaintiff in error and defendant in error on the trial of this case that Ferguson was not on the main line, or between the train that was being made up on the side track and the main line, until the train that killed him reached a point near where his lantern had been left between the main line and the train that was being made up, and that Ferguson thereafter came in such close proximity to the main line as to be struck by the pilot beam and killed, the jury had the right to conclude (as it did), and find from the evidence that Ferguson

was busily engaged in some work between two of the cars of the train that was being made up, such as coupling the air hose, or doing some other work necessary, and that he finished the work, and stepped from between the cars and far enough away from them to be struck by the pilot beam. No rule or custom prescribed the distance Ferguson might step from the freight cars. Then viewing these facts in connection with the fact that the plaintiff in error established the custom of causing the bell to be rung as the passenger train passed through the yards for the purpose of warning car inspectors of the approach of the train (as testified to by the conductor of the passenger train, R. 130), and the dangerous proximity thereof, and that the Supreme Court of Texas has accepted the jury finding that a failure to ring the bell on the occasion in question, was negligence which proximately caused the death of Ferguson, we must view the finding of the jury that Ferguson was free of contributory negligence in light of all of these circumstances. That is to say in balancing the evidence on the issue of Ferguson's contributory negligence, the jury had the right, and in fact it was its duty, to take into consideration the character of work in which Ferguson was engaged, including the common knowledge as well as the testimony to that effect, that Ferguson was to do the work of inspecting and connecting up the freight train somewhat hurriedly so as to avoid delaying that train; and the fact that Ferguson knew that the plaintiff in error had voluntarily established the custom of ringing the bell on the train as it passed through the yard, so as to

give him timely warning of its dangerous proximity; and the probability of Ferguson becoming confused when he stepped from between the cars by reason of the bright light, and made an effort to protect himself by turning from it to get his bearings, but which brought him in the path of the pilot beam; and if from all of these facts and circumstances, reasonable minds might differ as to whether Ferguson was guilty of contributory negligence in getting near enough the main line to be struck, then the finding of the jury in his favor on that issue is conclusive.

It occurs to us that it is very clear that the evidence raised an issue of fact as to whether Ferguson was guilty of contributory negligence, for even if he had known of the approach of the train, in view of the fact that the railway company had established the practice of ringing the bell to warn him of its dangerous proximity, when it should reach such a place as to make it dangerous to him, the jury had the right to conclude that Ferguson was not guilty of contributory negligence in failing to anticipate that the self-imposed custom would be on this occasion needlessly violated.

AUTHORITIES.

Evidence sufficient to show Ferguson's mind concentrated in his work.

Myers v. *Pittsburg Coal Co.*, 233 U. S. 184.
Choctaw Oklahoma & Gulf Ry. Co. v. *McDade*, 191 U. S. 64.
Marande v. *T. & P. Ry. Co.*, 184 U. S. 173.

Contributory negligence an issue of fact.

Railway Company v. *Stout*, 17 Wallace 657.
Richmond & Danville R. R. Co. v. *Powers*, 149 U. S. 43.
Kreigh v. *Westing House, Church, Kerr & Co.*, 214 U. S. 249.
McDermott v. *Severe*, 202 U. S. 600.
Shearman & Redfield—Negligence, 6th Ed. Sec. 114 (Note).

No assumed risk, if so issue of fact.

Gila Valley Ry. Co. v. *Hall*, 232 U. S. 94.
Union Pac. Ry. Co. v. *Huxoll*, 245 U. S. 535.
McGovern v. *Phil. & R. R. Co.*, 235 U. S. 389.
Sea Board Air Line Ry. Co. v. *Konnecke*, 239 U. S. 353.

The Court of Civil Appeals of Texas contended that Ferguson was sitting or squatting on or near the main line track, and negligently remained there until struck by the step of the pilot. The petitioner repudiated that theory (R. 222) in fact, the case was tried by both parties on the assumption that Ferguson came in the path of the pilot beam in an erect position. The Supreme Court of Texas reversing the court of Civil Appeals, held that the jury had the right under the evidence to conclude that Ferguson was not guilty of negligence. This case should not be confused with those cases in which it has been held that men who work on the track must protect themselves against the movement of trains which they know will be moved over the track without warning, such as:

Aerkfetz v. *Humphreys*, 145 U. S. 418.
Chesapeake & Ohio Ry. Co. v. *Nixon*, 271 U. S. 218.

It is a matter of the commonest knowledge that the very nature of the employment of a car inspector requires the concentration of his mind upon the work in which he is engaged, for upon its faithful performance, the safety of the train—the lives of employees and passengers—depend. This prompted petitioner to adopt the plan of ringing the bell, to notify Ferguson of the dangerous proximity of the train. The right of Ferguson to rely upon that warning, together with the character of his work, etc., must be taken into consideration in passing upon the question of contributory negligence.

PROPOSITIONS OF PETITIONER.

The respondent will now present an answer to the propositions of petitioner in the order in which said propositions are presented in its brief.

I.

In its first proposition the petitioner contends that Ferguson was guilty of negligence which as a matter of law contributed to his death.

Inasmuch as the burden of establishing contributory negligence was upon the petitioner, and it was submitted to the jury (R. 16) and found against it (R. 37) this court will not be interested in considering the question further than to ascertain that the evidence was not so conclusive of contributory negligence as that reasonable minds might not differ as to whether it existed.

That is to say when it shall be made to appear to this court that there was substantial evidence raising an issue as to whether Ferguson was guilty of contributory negligence, this court will accept the finding of the jury on that issue.

The petitioner used the sidetrack next to the main line for making up north bound freight trains; there was testimony that there would be a clear space of only four or five feet between cars on that track and a passing train (testimony of Nick Franklin, R. 95). The car inspectors might inspect from either side of the cars (R. 159); the petitioner had established the custom of requiring the engine bell to be rung on north bound

trains passing over that part of the main line to sharply notify car inspectors when such trains reached a place where they would endanger their safety. Conductor Proud said (R. 130, near bottom of page):

> "The idea of keeping the bell ringing was to apprise car inspectors and everybody else in the yard that a train was going through the yard, that the train was approaching—in other words, it is a separate and distinct noise from the noise of the train, and you can hear the bell above all that, it is a distinct noise of itself, and is a warning of the presence of the train."

The petitioner had established the common sense practice or custom of having the car inspector inspect its freight trains as they were being made up, beginning with the first cars shunted in to the caboose, and if practical have the work of inspecting the train finished by the time the last car was placed in same. After detailing how an inspector would inspect those cars, Nick Franklin testified (R. 94):

> "He did it in the most expeditious way owing to the speed the cars were being put in."

Nick Franklin, a car inspector of long experience in describing the manner of making inspection of freight cars while a train was being made up on the track next to the main line (R. 116) testified that the inspector would set his lantern down and go between the cars and connect up the air hose, and says (R. 116):

> "A person making the inspection of a train that way, would move away from the standing cars about two, or three or four feet, get back in the clear several feet, that is, the practice and habit

> of the inspectors. With reference to the distance between the main line and the passing track where Ferguson was killed, that inspectors were in the habit of moving from the cars, in stepping away from them, the main track and the switch track are right there close together, and when cars were on both tracks, there wasn't but three or four feet between the cars, and when you stepped back from the switch after making an inspection, you would step back close to the main line."

It is true that the petitioner contends that the witness, Franklin, was only estimating the distance, but if we accept the testimony offered by petitioner (R. 119) that the distance from the center of the main line to the center of the side track is 15 feet, and the testimony of its witness, Lillie (R. 175) that the pilot beam was 10 feet long, it is clear to any one that one-half of that pilot beam takes off 5 feet from the 15, and that if a car on the other track was of equal width, it would take off another 5 feet, leaving a clearance of only 5 feet when both tracks were occupied—less than 2 steps.

T. H. Burke, the conductor on the freight train that was being made up after stating that his engine had placed some cars in on the passing track where the train was being made up, testified with reference to the time these cars were placed on the passing track before the passenger train came in as follows (R. 135):

> "The best I can remember we had been away from there about twenty or twenty-five minutes when the plug came in that night."

The witness, A. H. Thorla (R. 111) passed those cars placed in on the side track a very short time be-

fore the passenger train came in, and as he passed he saw Ferguson with his lantern moving along side the cars as if inspecting the same.

The engineer on the passenger train (R. 124) and the fireman (R. 132) each testified that as they passed through the yard they kept a lookout and saw a lighted lantern between the main line track and the cars on the side track, but that no person was between the tracks or on the main line.

No one saw Ferguson when struck by the pilot beam, and no one saw his movements immediately before he was struck. The petitioner accepts the silent, but impressive blood stains on the pilot beam as conclusive that it caused his death. The question of whether his conduct was such as to constitute contributory negligence must be determined by the circumstantial evidence which the parties have been able to produce.

There is no necessity of resorting to conjecture; for inasmuch as it was Ferguson's duty to inspect the cars of this freight train as they were being placed on the track next to the main line (R. 116); and inasmuch as he was killed in approximately twenty-five minutes after the time Conductor Burke says they placed a string of cars on that track (for him to inspect) and left it to go to the scale track (R. 135); and inasmuch as he was seen by Thorla passing along this string of cars within three or four minutes of the time he was killed (R. 111); and inasmuch as the inspector who took up the work after he was killed, found that some fifteen cars had already been

inspected, and the air hose connected up (R. 94); and inasmuch as the engineer (R. 124) and fireman (R. 132) as their train approached where he was killed, saw his lantern on the ground between the tracks; and inasmuch as it was the custom for car inspectors to place their lantern on the ground or end of the ties when they went between the cars to connect the air hose (R. 115); and inasmuch as Ferguson must have been between the cars, as the engineer and the fireman, though keeping a lookout did not see him as they approached his lantern; the jury had the right to conclude that Ferguson did not carelessly step from between the cars and into the line of danger, with knowledge or charged with knowledge that the train was then rapidly approaching; but rather, that being engrossed in his work and having become accustomed to take heed of the warning that the sharp sound of the ringing bell would give him, he was misled into believing that no train was within dangerous proximity to him, and probably was blinded by the glaring headlight, all of which confused him, and in his efforts to get to a place of safety, or to turn from the light so as to get his bearings, he inadvertently stepped into the path of danger, and received his injuries.

In passing upon the question of the presence or absence of contributory negligence on the part of Ferguson, we must remember that the burden was upon the petitioner to establish contributory negligence, and it has offered no testimony raising that issue, other than the fact that he was killed by a train

that was being negligently operated. In this connection, it is not amiss to consider that for many years Ferguson had faithfully discharged his duties without being injured. That he was a competent and careful man is emphasized by the testimony of the man who had been his boss for more than two years, who says (R. 157-158):

> "Mr. Ferguson was a car inspector under me about two years and six or eight months; he was never laid off during that time, and there was never a black mark against his work during that time; I never so much as had a criticism against his work that I can recall" (S. F. 136).

It is not amiss to remember that the negligence of the petitioner in failing to blow the whistle and ring the bell, is emphasized by the fact that the engineer and fireman with full knowledge that it was usual and customary for the petitioner to make up freight trains on the track immediately east of the main line, saw the car inspector's lantern shining eastward upon cars standing on that track, and did not see the car inspector; the jury certainly had the right to conclude that they knew or should have known that the inspector was between those cars engaged in his work, and that he was entitled to the warning that both testified should have been given to him;

The petitioner seems to misunderstand the scope and effect of the case of *Aerkfetz* v. *Humphreys*, 145 U. S. 418, and other similar cases, which are not at all applicable to the facts of this case. The Supreme Court in the Aerkfetz case merely held that one

and which other witnesse

working on a track over which cars were being constantly shunted in a switch yard, took the situation as he found it, and as there was no custom of notifying him of the approach of cars, negligence could not be predicated on a failure to do so. Likewise, having full knowledge of the fact that cars were constantly shunted over these switch tracks without notice being given to men working on the tracks, he assumed the risk of being injured by such movement.

This case is in line with the case of *McGovern* v. *P. & R. R. Co.*, 235 U. S. 389—and the case of *Sea Board Air Line Ry. Co.* v. *Konnecke*, 239 U. S. 353—in that the deceased had the right to act upon the assumption that the petitioner would comply with its self-imposed custom of ringing the bell to warn him of the dangerous proximity of the train.

It is probable that the deceased, like one who concentrating his mind on what he is reading, may be suddenly aroused by the stroke of a clock, though he has been oblivious to the chatter of those about him, had so trained his mind to be warned by the ringing of the bell of an approaching train, that he was entirely ignorant of the ordinary noise made by the train, notwithstanding others heard such noise.

One may assume that while the car inspector was engrossed in his work, if he in fact heard the rumbling, the ordinary noises of the approaching train, he concluded that the same came from the movement of the engine that was making up the freight train, and certainly that he may have concluded that there was

no train in dangerous proximity to him. In fact, we may go a step further and without resorting to conjecture easily reach the conclusion that he mistook the noises of the approaching train for noises of the engine that was making up the freight train, and that in stepping from between the cars where he was working, he hurriedly got away from them and looked to the north to ascertain whether the light and the noise were in fact from the engine of the freight train.

The petitioner says:

> "The giving of warning signals is merely an additional precaution to warn parties of the approach of trains lest they fail in their duty to use proper diligence. In other words, it is a double precaution to assist the non-vigilant in case they are lax in their duty to protect themselves."

One having the smallest modicum of knowledge of the operation of railroads and trains, readily appreciates the fallacy of that statement. Such customs are established so as to increase the output and efficiency of the workmen. The car inspectors and other workmen would be forced to measurably neglect, or at least delay the performance of their duties if they were required to assume the burden of discovering the approach of trains which suddenly come into the yard without warning. The petitioner saw fit to place upon the operatives of the locomotive the small burden of ringing the bell, thereby relieving the inspector of trying to carry the burden of anticipating and providing against danger from passing trains, as

well as the burden of charging his mind with the discharge of the duties connected with his job, including watching for engines on the track on which he was inspecting cars.

There has never been a rule of law—there probably never will be, to the effect that a person engrossed in his work which encompasses and embraces the necessity for looking out for cars which may be shunted in on others while he is between them making inspections, must neglect his work, and listen for a train, the approach of which he has the right to assume will be heralded by the ringing of a bell.

One is held guilty of contributory negligence where he relies on another not being negligent, only in those cases where the injured party is shown to have had full opportunity to have discovered the danger, and negligently failed to exercise care for his own safety; where without having anything to divert his mind to other matters, he carelessly gets in the path of pending danger; such as where a pedestrian heedlessly steps upon a railway track immediately in front of an approaching train. But where the testimony and inferences to be drawn therefrom; and the presumption that one killed has exercised proper care, raise the issue of the mind being drawn away from impending danger, the question of contributory negligence is for the jury.

There is nothing in this case to indicate that Ferguson did not have the right to get near or even upon the main line.

It is said Ferguson knew the time the passenger train would reach Leesville. But he certainly was not required to work with his watch in his hand—in fact it would have been impossible for him to do so; and why adopt the custom of ringing the bell instead of depending upon the ordinary noise of the approaching train, if men engrossed in their work could not rely upon it as a warning.

It is argued by petitioner that the train was visible and made much noise, and that deceased should have known of its approach; but such argument ignores the fact that petitioner was violating its custom of ringing the bell, and that the evidence justified the jury in finding that Ferguson was engrossed in his work, and in watching the movements of the switching train. It is believed that it has been quite universally held that where one is engaged in work, or has his attention in any way diverted from the danger, that he is not guilty of contributory negligence in failing to anticipate negligence of the wrong doer. Certainly if it be viewed as an original proposition, it must impress one that such rule should prevail, for it would be impossible for the traffic of the world to be moved for a day, or for one to go to or return from his office without assuming that others would not be guilty of negligence in their movements.

We review some of the cases relied upon by the petitioner to show that they are inapplicable to this case. In *Chicago etc. Ry. Co.* v. *Frese*, (263 U. S. 1) the engineer was required by a statute to not cross

another railroad, without first ascertaining it was clear. The failure to discharge such duty precluded a recovery.

The case of *Chesapeake etc. Ry. Co.* v. *Nixon*, 271 U. S. 218, merely holds that where no custom exists requiring the operatives of a train to keep a lookout for a motor car, and the rules require a motor car operator to keep a lookout for trains, the motor car operator cannot recover for an injury growing out of a collision.

This case is essentially different from those cases—in that the petitioner, apparently for the purpose of increasing the output, as well as raising the factor of safety in the thoroughness of the inspections that it could thereby obtain, elected to relieve the inspector's mind of the burden of keeping the possibilities of other trains approaching constantly in view, by requiring the bell to be rung as the trains passed along where the car inspectors were expected to be engaged in their work.

The nature of work required of the deceased suggested the importance of concentrating upon it. The jury had the right to conclude that if the bell had been rung Ferguson would not have been killed.

The other cases relied upon by the petitioner in support of its first proposition, are cases where the injury was brought about by the servant violating some rule of the company, or crossing cases which are so unlike the present case as to need no further comment than to point out the lack of similarity.

The fact that the deceased had for ten or twelve years discharged his duties, and avoided injury from all trains carefully operated—and it may be some carelessly operated, and that his boss for whom he had worked for two years found him safe, competent and careful—never a black mark or a complaint against him; and that when he was injured it was by a train being negligently operated, is of more than casual importance in passing upon the negligence of the petitioner and the contributory negligence of the deceased.

It is believed that it is quite universally established that negligence and contributory negligence are issues of fact for the determination of a jury, except in cases involving statutory regulations, and those cases in which the minds of reasonable men can not differ as to the conclusions that should be reached. The question of what should and what should not be submitted to the jury naturally brings us to the case of *Railway Company* v. *Stout*, 17 Wallace, 657.

This case has so long been recognized as the leading authority upon this question, and has been quoted so often that practically every lawyer in the land knows by heart the principles therein laid down. We quote, not to apprise this court of anything which may be termed elementary authority, but because we deem it as applicable to this case, and because it expresses the principles involved herein as well as they have been expressed, or ever can be expressed.

> **"Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used,**

and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of the jury.

Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus concurring than can a single judge."

We herein offer and commend to the court's attention some of the cases which recognize and follow the rule. We trust that, in thus presenting such a voluminous list of authorities, we are not unduly trespassing upon the court's time; but we feel that, though the question as to what should and what should not be left to the jury has been settled countless times, nevertheless it is incumbent upon us to produce authorities sustaining our viewpoint, and to present them, to the best of our ability, in such manner as least to inconvenience this court in reviewing them.

In the case of *Richmond & Danville Railroad Co.* v. *Powers*, 149 U. S. 43, the United States Supreme Court, speaking through Mr. Justice Brewer, says:

> "The only error assigned is in the refusal of the court to instruct the jury as requested, substantially that the deceased was guilty of such contributory negligence as to prevent a recovery. **It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them.**"

This case has been quoted many times, always with approval. We name one case, *McDermott* v. *Severe*, 202 U. S. 600, 50 L. Ed., 1162, in which the court says:

> "Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence. **If fair-minded men, from the facts admitted, or conflicting testimony may honestly draw different conclusions as to the negligence charged, the question is not one of law, but of fact, and to be settled by the jury under proper instructions.**"

It is not essential to sustain a recovery in cases like this that there should be direct evidence by the mouth of eye witnesses to the occurrence. The manner in which the accident happened, as well as the absence of contributory negligence may be established by circumstances.

In *New York Central Ry. Co.* v. *Gapinski*, 161 C. C. A. 354, the plaintiff, Gapinski, was injured while bending over stuffing grease into the journal boxes of freight cars. His injury was claimed to be due to the

fact that he was struck by some projecting object upon a car which was "sent down upon the track on which or alongside of which he was working."

Gapinski testified that he did not know what hit him because when struck he was stooping or leaning over and working. "There was direct evidence that many of the cars" which were "sent down on said track were 'crippled,' *i. e.* cars 'with doors hanging out.'"

The testimony as to the crippled cars was denied, and the issue being submitted, Gapinski had a verdict.

The opinion of the court is as follows:

> "It is, we think, sufficient to dispose of this writ to refer to *Smith* v. *Pennsylvania R. R. Co.*, 239 Fed. 103, 151 C. C. A. 277. We there pointed out that, where there was no proof that any definitely indicated thing wrought the injury complained of nor 'that the circumstances rendering it possible for the injuring thing suggested **by plaintiff** to reach or touch, **plaintiff** existed at the time and place of damage, any verdict resting on such evidence, or lack of it, would be building one presumption upon another.
>
> "In that case, the suggested instrument of injury was the swinging rake hook of a passing locomotive. In this case, the suggested cause of plaintiff's hurt was a door hanging or projecting below the car body to which it belonged. But in the Smith case, **there was no evidence whatever** that any rake hook was projecting at the time, when and place where plaintiff was injured. In this case, there is direct evidence that not one, but several, if not many, cars having such unusual and dangerous projections were moving upon the track alongside of which plaintiff here was required to work.

> "**If the jury believe (as it did) this positive testimony of moving crippled cars, it was within their province to draw the inference that such proven projection did the hurt.** In the Smith case, there was no proven projection. We think the cases cited and the present one **considered together** perfectly illustrate the difference between a legitimate presumption from proven facts, and an attempted and unlawful presumption from another presumption."

In the case of *Kreigh* v. *Westinghouse, Church, Kerr & Co.*, 214 U. S. 249, 53 L. Ed. 984, the supreme court said, speaking through Mr. Justice Day (page 258):

> "Questions of negligence do not become questions of law, to be decided by the court, except '**where the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish.**' *Gardner* v. *Michigan Central R. Co.*, 150 U. S. 349, 361; 37 L. Ed. 1107, 1110."

We next offer the case of *Myers* v. *Pittsburg Coal Company*, 233 U. S. 184, 192, 193, 194; 58 L. Ed. 906, 911.

In that case, Myers was a brakeman on an underground mining train and had ridden a string of cars in on a switch. The electric motor car followed these cars in on this switch, where it ran upon something and was stopped. It was then discovered that Myers had been run over.

Near the point where Myer's body was found, the overhead trolley wire, which supplied the current to the electric motor car, passed over the tracks at a height of five feet seven and one-half inches from the rail, making it necessary for a man of ordinary height to remain seated in the car or stoop down. There was no light near this place.

The headlight on the motor car was defective and was not burning.

The case was submitted to a jury and a verdict was had by Myers' widow.

The verdict was reversed by the circuit court of appeals.

The supreme court reversing this holding after stating the facts, said, in part:

> "The opinion of the Circuit Court of Appeals placed the reversal largely upon **the want of definite proof as to the manner in which Myers came to his death—whether by contact with the wire, or if so, whether that merely disabled him or he was only injured or stunned by the fall, was seized with vertigo or other sudden sickness and fell from the car for that reason, or lost his footing by some unexpected movement of the train, or voluntarily got off the car and stumbled and fell upon the track, or became bewildered in the dark, and mistakenly supposed himself to be in a place of safety. The court held that all these situations were more or less probable, and in the absence of some accurate means of ascertaining the true condition in this regard, no recovery could be had for the wrongful causing of his death, and that an examination of the testimony brought the court to the conclusion that the jury should not have been permitted to guess as to the proximate cause of death.** * * *

> "Considering the testimony, as it must be considered in determining questions of this character in appellate courts, in its most favorable aspect to the plaintiff below, we think the jury might well have found, in view of the place at which the body of Myers was found near to the wire, with his cap gone from his head, that he came in contact with that wire and was thrown to the ground, and that he survived from contact with the wire, carrying the voltage which it did, and while in this situation, he was run over and killed by the approaching motor car, the operator being unable to see his body upon the track because of the want of efficient light in the entry or in the motor car. We think reasonable men, considering the testimony adduced, might well have come to this conclusion, and that it was error in the appellate court to set aside the verdict for entire absence of testimony upon this subjct. In our opinion, the trial court properly left the question to the jury upon the testimony which, when fairly considered, might sustain the verdict."

The negligence of petitioner was proved from the mouths of living witnesses. Petitioner was guilty of this negligence at the moment of Ferguson's death and just preceding it and at the exact place of his death. It was just the sort of negligence that a reasonable man would expect to result in the death or injury of some person or persons situated as Ferguson was.

Where circumstances must be relied upon to ascertain the precise cause of death, an inference must be drawn. We state frankly that we believe the jury would have been justified in finding against the respondent in this case. But we insist that as yet no court has held, so far as we can learn, that the proximate cause of death in cases of this character, can not

be proved by circumstances. A rule that "A," though guilty of the grossest sort of negligence, is not legally responsible for the negligent injury of "B" merely because "B" must rely upon circumstances to connect "A's" negligence with "B's" injury—such a rule is so repugnant to law and justice as almost to provoke derision. If a murderer can be hanged upon circumstantial evidence, it seems to us justice demands that the same sort of evidence be available to one who suffers injury at the hands of a negligent wrong-doer. That such is the law is shown by a review of the cases cited herein.

In the case of *Railway Company* v. *Howard*, 79 Ga. 44, the court said:

> "The question of what is ordinary care and what is negligence is exclusively for the jury, and the court in this charge takes this question from their consideration * * * The court cannot instruct the jury what a prudent man would do; for in legal contemplation, the jury knew it better than the court. If instructions on that subject had to be given, the jury would be the instructors and the court the instructed; that is, the jury would charge the judge on that part of the case, rather than receive a charge from him. It is not for the court to teach the jury the ways of the prudent man, but to warn them of the duty on the part of all others to make their ways like his. The court cannot point out to the jury specifically the ways of the prudent, the law supposing those ways better known to the jury than to the judge."

In Section 114, Shearman & Redfield on Negligence, 6th Ed. it is said:

> "Negligence is not absolute, but is a thing which is always relative to the particular cir-

cumstances ~~of~~ on which it is sought to be predicated. For this reason it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a very general rule, it is a question for the jury—an inference to be deduced from the circumstances; it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. The fact that the evidence may be without conflict is not controlling, nor even necessarily material. Conceded facts may as readily afford a difference of opinion as to the inferences and conclusions to be drawn therefrom as those which are upon conflicting evidence, and, if there be room for such difference, the question must be left to the jury" (Note, page 285).

It should always be remembered that a jury is made up of the average of the community—of the men who make up our people. These men are not the creatures of government and courts, but the government is their own creation and may be changed, modified or abolished entirely, if the people so desire. Whenever a government begins to usurp the powers and privileges of the people who created it, then it is on the way toward becoming a Frankenstein monster, and will ultimately destroy its creators or make their lives so miserable that they will turn and demolish the machine which is getting beyond the control of its masters.

However, we do not feel that there is any danger of this for a long time, if ever. The courts are practically unanimous in their recognition of the jury's right to try issues of fact; and so we believe that this court will hold, as it has always in the past that where

the testimony is conflicting, as it is in this case, the privilege of deciding upon these disputed facts will be left to the jury.

II.

The petitioner presents for its second proposition the contention that Ferguson was guilty of negligence which was the sole cause of his death.

COUNTER PROPOSITION.

The conduct of the master was the equivalent of a contract in which it agreed with the servant that he could depend upon the bell for warning.

The petitioner contends that the deceased should have heard the train though the bell was not rung, and that he not being entitled to a particular kind of sound announcing the approach of the train, should have avoided it.

We of course cannot anticipate to the extent of knowing what view this court will take of this contention; but it appears to us that if one will give fair consideration to the duties and responsibilities of a car inspector, he will readily reach the conclusion that common fairness—yea common honesty demands that this self imposed duty of ringing the bell to warn deceased, was the equivalent of a voluntary contract entered into by each, in which the master to insure a high standard and degree of efficiency in inspection as well as a maximum amount of work, agreed with the servant that he could depend upon the sharp sound of the bell to warn him of danger. The case is wholly unlike the crossing cases and cases where the servant

was violating rules of the master; the deceased was doing just what was to be expected of him. It would be unfair to let the master escape the burdens occasioned by a breach of its contract.

A detailed answer to this proposition would consist largely in a re-hash of what has been said in answer to petitioner's first proposition. Under this proposition the petitioner presents argument that inasmuch as the jury found that Ferguson was blinded by the glaring head light, that it contradicts the finding that the negligence in failing to ring the bell was the proximate cause of Ferguson's death. This argument ignores the well established doctrine that there may be more than one proximate cause of an injury, especially where those causes are not inconsistent.

We emphasize the statement that there is no inconsistency in the finding, by calling attention to the fact that the evidence was sufficient to have justified the jury in finding that Ferguson had been engrossed in his work between two cars, and not being advised of the approach of the train by the customary sharp ringing of the bell, stepped away from the standing cars, and met the glare of the headlight, which blinded him, and caused him to become confused, thereby causing him to stumble into a position of danger, or prevented him from appreciating the distance he was from the track, and the distance the approaching train was from him—in other words, that the failure to ring the bell, and the glare of the headlight operated as two proximate though joint causes of him being injured. If either constituted negligence, the petitioner is liable.

The authorities relied upon by the petitioner to sustain its theory of its being conjecture as to whether the failure to ring the bell was the cause of the injury, are not in point. It is quite self evident that when the master adopted the plan of ringing the bell to warn car inspectors of the approach of the train, that it foresaw the probability of the failure to ring the bell, causing injury to the inspectors. It appears to us that one would become ridiculous by arguing that it should not have anticipated some similar injury might result.

The petitioner argues that if deceased was blinded by the headlight, he knew of the approach of the train and cannot complain of the failure to ring the bell, as he assumed the risk of the bright headlight. We merely remark that the negligent failure to ring the bell being a proximate cause of the injury, it is immaterial that other conduct not culpable or negligent, participated in causing the injury. The glaring light is an explanation of why the failure to ring the bell caused the injury.

There was no finding that the deceased saw the headlight in time to have by the exercise of ordinary care on his part, avoided the injury—nor does the testimony show that he had such notice in time to have avoided the injury.

In this connection we call attention to the fact that the locomotive was being operated in violation of the National Safety Appliance Laws, and the applicable rules of the Interstate Commerce Commission in that the headlight on the locomotive that struck Ferguson

was not "diminished in the yard and at the station." The applicable rules of the Interstate Commerce Commission after requiring the use of certain designated headlights on road engines, provides in Section (c):

> "Such headlights shall be provided with a device whereby the lights from same may be diminished in yards and at stations, or when meeting trains" (R. 179).

Section 131 of the said rules of the Interstate Commerce Commission provides the character of lights that shall be used on engines engaged in switching service in the yards (R. 179).

The engineer testified (R. 123) that he had a bright headlight which was provided with a dimmer, but says:

> "I did not cut out my light or dim it in any way in going through the yards, I had a bright burning light."

The testimony was conclusive that the light was not dimmed.

It was shown (R. 85) that with a bright headlight such as described, that when the engine got within 200 feet of a person, if he looked toward it, it would blind him so that he would not know or could not see what he was doing. That it would prevent him from telling how far the train was from him.

> "If it was burning full bright, it blinds them, he just can't see."

There was quite a bit of uncontroverted testimony on this point conclusively establishing the well known

fact that an undimmed headlight when it gets reasonably near to one, has the effect of suddenly causing temporary blindness, and producing a state of confusion. This is common knowledge.

We submit that inasmuch as the petitioner was confessedly violating the Safety Appliance Laws, and that there was sufficient evidence to sustain the jury finding, that such operated as a proximate cause of Ferguson's death, that in any event, the judgment of the trial court should be sustained, because contributory negligence, if any, does not apply where the injury is caused in whole or in part by the violation of the safety appliance laws, or the applicable rules of the Interstate Commerce Commission thereby authorized (*Union Pac. Ry. Co.* v. *Huxoll*, 245 U. S. 535).

III.

Petitioner's third proposition contends that Ferguson met his death as the result of a risk assumed by him.

In support of that proposition, the petitioner presents some general statements of the law relative to assumed risk, but it is believed they are wholly inapplicable to this case. The jury found that Ferguson's death was caused by negligence of the petitioner in failing to comply with its self imposed duty of ringing the bell as the train passed through the yard.

There being no contention that Ferguson knew of the dangerous proximity of the train, in time to have avoided being injured by it, it is confidently believed

that the issue of assumed risk was not raised; but, if it was in fact raised, it was certainly an issue of fact to be determined by the jury, and having been so determined adversely to the petitioner, there is no merit in its contention.

We feel somewhat disposed to apologize for calling attention to the fact that it is the well established doctrine of this court, that one does not assume the risk of injuries resulting from negligence unless he knows of the particular negligence, and appreciates the danger to him, or the negligence is so open and obvious that in the discharge of his own duties he would have become apprised thereof, and appreciated the danger arising to him therefrom, in time to have by the exercise of ordinary care avoided the injury.

Gila Valley Ry. Co. v. *Hall*, 232 U. S. 94.
McGovern v. *Phil. & R. R. Co.*, 235 U. S. 389.
Sea Board Air Line Ry. Co. v. *Konnecke*, 239 U. S. 353.

IV AND V.

Under the above heading the petitioner contends that the supreme court erred in failing to reverse outright the judgment of the district court, and in reversing the judgment of the Court of Civil Appeals.

We pass without comment the suggestion of the petitioner that this court should deviate from its time honored rule, and in this case weigh the evidence to determine which litigant is favored with the preponderance thereof.

The contention of the petitioner that the finding of the jury that the proper signals were not given, and that the train headlight blinded the deceased are contradictory, is without merit, as there was no finding that the deceased was blinded by the headlight in time for him by the exercise of ordinary care on his part, to have avoided being injured by reason of the failure to ring the bell. Nor is there any merit in the contention of the petitioner that the evidence showed deceased was blinded by the headlight at such time as to excuse the master for having failed to give the proper warning.

The finding by the jury that the headlight blinded the deceased, was not a finding that the deceased knew of the approach of the train in time to have avoided being injured by it, nor was it a finding that the blinding headlight was the sole cause of the injury, so as to even raise the issue of the injury being caused by a risk assumed by the deceased.

VI.

Petitioner's sixth proposition contends that the Supreme Court of Texas failed to follow the rules of law established in the federal courts in construing the Federal Employer's Liability Act.

We do not find any warrant in the record for this charge made against the Supreme Court of Texas.

We very readily agree that the applicable decisions of the Supreme Court of the United States, control the rights of the parties to this suit insofar

as the points have been passed upon by the opinions of this court. However, we call attention to the fact that the rights of the parties have been ruled by the applicable decisions of the Supreme Court of the United States, and that we have relied upon those decisions for our contentions in this case.

We fail to find anything in the opinion of the Supreme Court of Texas, in this case, which suggests that its conclusion was reached by a rule not applicable under the decisions of the United States Supreme Court or other Federal Courts. The Supreme Court of Texas adopted the second opinion rendered by the Court of Civil Appeals of Texas, in which the judgment of the trial court was affirmed.

It is confidently believed that the conclusion reached by the Supreme Court of the State of Texas in this case, is fully supported by the applicable decisions of the Supreme Court of the United States.

We do not believe that this court is committed to the doctrine suggested by the petitioner, to the extent of making it applicable to cases like the one we are considering here. In this case every employee who testified, seems to have known that the railway company had voluntarily assumed the burden of ringing the bell on engines passing through the yards at Leesville, to warn car inspectors of the dangerous approach of the train. The character of the car inspector's work is such that it is apparent to any one that he would likely depend upon the sharp ringing of the bell to warn him of the dangerous approach of the train.

We repeat that we have relied, and still rely upon the opinions of this court to sustain our contention that the petitioner was guilty of negligence that proximately caused the injury, and that the deceased was not guilty of contributory negligence.

Sustaining our contention that the evidence was sufficient to support the jury finding that Ferguson had been working between the cars of the freight train that was being made up when the passenger train approached, and that he suddenly stepped from between those cars and came in position to be struck by the freight train, we have cited:

Myers v. *Pittsburg Coal Co.*, 233 U. S. 184.
Marande v. *T. & P. Ry. Co.*, 184 U. S. 173.
Choctaw & G. Ry. Co. v. *McDade*, 191 U. S. 64.

To sustain our contention that contributory negligence was an issue of fact for the jury, we have relied upon:

Railway Company v. *Stout*, 17 Wallace, 657.
Richmond & Danville Railway Co. v. *Powers*, 149 U. S. 43.
McDermott v. *Severe*, 202 U. S. 600.
Kreigh v. *Westinghouse, etc., Co.*, 214 U. S. 249.
Sea Board Air Line Ry. Co. v. *Konnecke*, 239 U. S. 353.

Supporting our contention that the issue of assumed risk was correctly determined against the petitioner, we have cited:

Gila Valley Ry. Co. v. *Hall*, 232 U. S. 94.
Union Pac. Ry. Co. v. *Huxoll*, 245 U. S. 535.

McGovern v. *Phil. & R. R. Co.*, 235 U. S. 389.

Sea Board Air Line Ry. Co. v. *Konnecke*, 239 U. S. 353.

We respectfully submit that this case was correctly disposed of by the Supreme Court of Texas, and we pray that the judgment of that court be in all things affirmed.

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S. P. Jones,
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SUPREME COURT OF THE UNITED STATES.

No. 349.—October Term, 1927.

The Kansas City Southern Railway Company, Petitioner, *vs.* Franklin Jones, administrator of the Estate of D. R. Ferguson.	On Writ of Certiorari to the Supreme Court of the State of Texas.

[March 19, 1928.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action under the Employers Liability Act for the death of one R. D. Ferguson who was a car inspector on the petitioner's road. No one saw the death but the body was found between the main track and a parallel track, and the probability is that Ferguson was killed by a train going north on the former. A freight train was being made up on the parallel track, and the hypothesis of the respondent, supported by little if anything except the place where the body and the lantern of the deceased were found, is that Ferguson was engaged in inspecting the cars, and so absorbed in his work that he did not hear the approaching train but was relying upon the ringing of the engine bell, which usually was rung but which the respondent's witnesses say was not rung on this occasion. The Court below sustained the verdict on this ground. Ferguson was seen not later than a quarter before seven in the evening, so far as time can be fixed. The train passed at five minutes after seven, the time at which it was known by him to be due. His body was found at twenty-five minutes after seven. He was an experienced man. The indications are that there was nothing for him to inspect at the probable time of his death. At best it is a mere guess that he was so engaged, still more that he was absorbed in such work. The main track was straight and the train was making a great noise and showing a bright light as it

approached. Nothing except imagination and sympathy warranted a finding that the death was due to the negligence of the petitioner rather than to that of the man himself. It is unnecessary to consider whether if the case for the plaintiff were stronger the principle of *Chesapeake & Ohio Ry. Co.* v. *Nixon*, 271 U. S. 218, would apply.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.